Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

CURTIS GUIDRY,

Petitioner,

v.

SHEET METAL WORKERS' NATIONAL PENSION FUND; SHEET METAL WORKERS' LOCAL UNIONS AND COUNCILS PENSION PLAN; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 9; SHEET METAL WORKERS' LOCAL NO. 9 PENSION FUND, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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105 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is this Honorable Court's 1990 decision and mandate in this very case, that Guidry is entitled to his pension as a "stream of income," the law of the case, regardless of whether the lower courts believed such outcome is correct?

2. Does the anti-alienation provision of the Employee Retirement Income Security Act of 1974 ("ERISA") require that pension benefits received by a pensioner be exempt from execution, as long as they remain identifiable?

3. Should Guidry be awarded his reasonable attorney fees under ERISA, 29 U.S.C. § 1132(g), for fees arising after this Court's 1990 decision?

4. Does the Texas state exemption law for pension benefits apply in the event that the ERISA anti-alienation clause does not?

LIST OF PARTIES

The parties to this case are Petitioner Curtis Guidry and Respondents Sheet Metal Workers' National Pension Fund; Sheet Metal Workers' International Association, Local 9; Sheet Metal Workers' Local No. 9 Pension Fund; Edward J. Carlough, Robert T. Stringer, C.T. Roff and Cavet Snyder, Trustees; Sheet Metal Workers' Local Unions and Councils Pension Plan and Edward J. Carlough, Cecil D. Clay, George J. Cuddihy, Urie E. Williams, Jr. and Richard J. Scott, Trustees.

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The majority decision of the Tenth Circuit three-member panel, with one dissent, was issued on November 4, 1993, and is reported at 10 F.3d 700 (10th Cir. 1993). A Petition on Rehearing En Banc was granted, and a decision of the Tenth Circuit en banc was delivered November 1, 1994, and is published at 39 F.3d 1078 (10th Cir. 1994). The opinion of the District Court was unpublished and is dated January 8, 1992, which is being produced along with the two opinions of the Tenth Circuit in the Appendix.

JURISDICTION

The en banc decision and mandate of the Tenth Circuit issued on November 1, 1994. This Court's jurisdiction to review the Tenth Circuit's opinion and judgment arises under 28 U.S.C. § 1254(1).

PERTINENT STATUTES

The Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, provides in 29 U.S.C. § 1056(d)(1), as follows:

> Each pension plan shall provide that the benefits provided under the plan may not be assigned or alienated.

ERISA provides in 29 U.S.C. § 1132(g)(1), as follows:

> In any action under this subchapter (other than in an action described in paragraph (2)) by a

> participant, beneficiary or fiduciary, the court, in its discretion, may allow a reasonable attorney fee and costs of action to either party.

Vernon's Tex. Prop. Code Title 5, § 42-0021(a)(1992) provides in part, as follows:

> A person's right to the assets held or to receive payments, whether vested or not, under any . . . pension . . . plan . . . is exempt from attachment, execution, and seizure for satisfaction of debts.

STATEMENT OF THE CASE

In a unanimous decision on January 17, 1990, this Honorable Court reversed the Tenth Circuit, which had earlier found that an equitable exception should be created in ERISA's anti-alienation clause so as to deprive Guidry, a convicted criminal, of his pension benefits. *Guidry v. Sheet Metal Workers' Nat'l Pension Fund*, 493 U.S. 365, 110 S. Ct. 680, 107 L. Ed. 2d 782 (1990). This Court held that ERISA "erects a general bar to garnishment of pension from plans covered by the Act." *Id.* at 371, 110 S. Ct. at 685. The Court found that ERISA should be interpreted "consonant with other statutory provisions designed to safeguard retirement income," and cited the Social Security Act, 42 U.S.C. § 407, the Railroad Retirement Act, 45 U.S.C. § 231(m)(a)(1982)(ed. Supp. V), the Civil Service Retirement Act, 5 U.S.C. § 8346(a), and the Veterans Benefits Act, 38 U.S.C. § 3101(a). *Id.* at 371, S. Ct. at 685 and note 13. The Court held that the ERISA anti-alienation clause elects a "considered Congressional policy choice, a decision to safeguard a stream of income for

pensioners (and their dependents, who may be, and usually are, blameless), even if that decision prevents others from securing relief for wrong done them." *Id.* at 376, 110 S. Ct. at 687. The Court further acknowledged that the anti-alienation clause "acts by definition, to hinder the collection of a lawful debt." The Court then concluded that, "It makes little sense to adopt such a policy and then refuse enforcement whenever enforcement appears inequitable." *Id.* at 376-377, S. Ct. at 687. The Court remanded the matter back to the lower federal courts "for further proceedings consistent with this opinion." *Id.* at 377, S. Ct. at 688.

After remand, the District Court entered judgment ordering payment of Guidry's back and future pension funds. Sheet Metal Workers International Association, Local No. 9 (the "Union") then began garnishment of Guidry's current monthly pension fund that was segregated in a banking account. As to the past due sums of over $190,000, Guidry's attorney had directed that such sums be delivered to the segregated bank account in Colorado. The Pension Funds and the Union, however, co-ordinated a delivery of the sum in a bag to Guidry's home in Texas. A group of local police officers, a deputy United States Marshal, and a Denver attorney for the Union proceeded to Guidry's home. Guidry came to the door and refused to accept the bag of money stating it was to be delivered elsewhere, but the bag was set at his feet. The deputy United States Marshal immediately picked up the funds in the bag from Guidry's feet and left with it. The parties then entered into a series of stipulations to put the issue before the District Court. 10 F.3d at 704, Appendix, A-72-A-81.

The District Court, after considering the issues, ruled as follows:

> The ERISA exemption from garnishment, 29 U.S.C. § 1056(d)(1), is applicable to checks payable to the plaintiff from the Funds and to the stream of income received through the proceeds of these checks, so long as the proceeds are clearly identified as such and have not been commingled with other funds or used for the acquisition of assets . . . [t]his conclusion as to the scope of the exemption is mandated by the law of this case in *Guidry v. Sheet Metal Workers' Nat'l Pension Fund*, 493 U.S. 365 (1990). Appendix, A-69.

By opinion dated November 4, 1993, 10 F.3d at 700, the majority of a three-member panel, with one dissent, disagreed. The Tenth Circuit acknowledged that the law of the case requires every court to follow the decisions of courts that are higher in the judicial hierarchy, and that the doctrine applies to issues decided previously, either explicitly or by necessary implication. The majority decided, however, that, despite the "stream of income" language, this Court had not either implicitly or explicitly decided the post-receipt garnishment issue.

The majority opinion continued to consider the issue of whether ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1), in fact bars garnishment. The panel held that, "The statute is not clear," *Id.* at 708, and that, since the statute was not clear, the Court considered the application of the Department of Treasury regulations arising under ERISA. The Court called such regulations "shadow casting," *Id.* at 711, but went on to attempt to determine whether such regulations were consistent with the objective of ERISA.

The panel acknowledged from a prior Supreme Court decision that ERISA "is to insure pension benefits will actually be received upon retirement by plan participants and beneficiaries." *Id.* at 711. The Court quotes from legislative history that Congress wanted to insure that an employee's accrued benefits are actually available for retirement purposes. *Id.* at 711. The Court then asked whether the regulations are so inconsistent with this purpose, that they are unreasonable, and states, "This is a close question." *Id.* at 711. The panel then reasoned that Congress was more explicit in other statutes in protecting paid benefits, such as under the Social Security and Veterans Benefit Acts, and finds ERISA inapplicable to the Guidry garnishments. The Court acknowledged that, " . . . we are aware that garnishment in the present context may *thwart* Congress' intent" [emphasis added], but concludes that ERISA is inapplicable. *Id.* at 716. The panel also held that the Colorado pension anti-garnishment law was preempted by ERISA and that the issue of the Texas blanket anti-garnishment law was moot. One member of the panel dissented, stating that the law of the case in this Court's 1990 unanimous decision should control, and further stated that the matter should be remanded back to the District Court for a more thorough determination of whether Guidry was entitled to his attorney fees. *Id.* at 717 and 718.

The Tenth Circuit, en banc, after reconsidering all issues, held that, "We find no reason to further clarify or disturb the panel's analysis of the law of the case." 39 F.3d at 1081 n.2. With regard to the issue of the applicability of ERISA § 206(1), 29 U.S.C. § 1056(d), to pension funds post-receipt, the Court agreed with the majority of

the first panel, and held that the legislative history on 206(d)(1) is "sparse and inconclusive," *Id.* at 1082, but gave deference to the Department of Treasury regulations, holding that, "We therefore affirm the primary holding of the *Guidry II* panel and conclude ERISA § 206(d)(1) protects ERISA-qualified pension benefits from garnishment only until paid to and received by plan participants or beneficiaries." *Id.* at 1083.

The en banc decision, however, held that the preemption provision of ERISA did not apply to Colorado law, and that Guidry was entitled to his state law 75% exemption under Colorado law. The en banc opinion, however, held that the blanket Texas pension exemption for Guidry was moot, *Id.* at 1087, and that as to attorney fees, "we find no grounds for reversing the district court's ruling that Mr. Guidry was not entitled to a fee award under ERISA's fee-shifting provision, 29 U.S.C. § 1132(g)." *Id.* at 1087 n.11.

REASONS FOR GRANTING CERTIORARI

I. LOWER COURTS MUST STRICTLY ADHERE TO THE LAW OF THE CASE DOCTRINE, IN ORDER TO PROMOTE JUDICIAL ECONOMY AND THIS IS AN IMPORTANT ISSUE OF JUDICIAL ADMINISTRATION.

This case squarely presents the opportunity for this Court to enunciate a doctrine that, in this all too litigious society, lower courts must follow the mandate of a higher court, despite the efforts of creative litigants to continue endless litigation. In its initial decision in *Guidry* in 1988,

the Tenth Circuit pronounced that, despite the breadth of the anti-alienation clause, it was inequitable to apply it in this case. 856 F.2d at 1457. Despite a ruling by this Court in 1990, it is clear from both the majority opinion of the first panel and the en banc decision, that the Tenth Circuit still considers it inequitable that Guidry is entitled to his pension. It is important that this Court clearly enunciate the law of the case doctrine, as one facet of a policy to control burgeoning litigation, especially when the Court explicitly and implicitly has already ruled once on the issues.

The majority in the initial Tenth Circuit decision recognized that law of the case doctrine applies to issues previously decided by a higher court, "either explicitly or by necessary implication." *Cherokee Nation v. State of Oklahoma*, 461 F.2d 674, 678 (10th Cir.), cert. denied, 409 U.S. 1039 (1972). 93 S. Ct. 521, 34 L. Ed. 2d 489. The majority opinion also recognized that, under the law of the case doctrine, if this Court's 1990 *Guidry* opinion contained dicta which clearly resolved an issue, a lower court is still bound by that dicta under the law of the case, *Id.* at 706 n.3. The Tenth Circuit has also explained the law of the case doctrine in *Anthony v. Baker*, 955 F.2d 1395 (10th Cir. 1992), in these terms:

> The law of the case doctrine is 'a restriction self-imposed by the courts in the interests of judicial efficiency. It is a rule based on sound public policy that litigation should come to an end and is designed to bring about a quick resolution of disputes by preventing continued reargument of issues already decided.' *Fox v. Mazda Corp. of America*, 868 F.2d 1190, 1194 (10th Cir. 1989). *Id.* at 1397 n.1.

Stare decisis is an allied doctrine which relates to a judicial doctrine of the precedential effect of other cases. This Court, in *Webster v. Reproductive Health Services*, 492 U.S. 490, 518, 109 S. Ct. 3040, 3056, 106 L. Ed. 2d 410 (1989), stated, "*Stare decisis* is the cornerstone of our legal system . . . " Similarly, the law of the case should be cornerstone of our legal system, to put an end to litigation.

The Tenth Circuit erred in reading out the law of the case doctrine, in holding that this Court's 1990 decision was inapplicable, both explicitly and implicitly. This Court's "stream of income" language in *Guidry*, at 376, 110 S. Ct. at 687, is as explicit as possible, since it is neither a "stream" nor "income" if pension funds are garnished at the moment of payment. Further, the decision is explicit, since the whole purpose of this litigation was for Guidry to secure his pensions. The very Complaint that initiated this suit in April 1984, demanded for relief an order valuing Guidry's pension benefits and a judgment for such amount. (Joint Appendix, pages 9 and 10, in the earlier Petition for Certiorari, granted June 26, 1989, Case No. 88-1105). That Complaint makes clear that Guidry was not just engaging in an intellectual exercise, but was seeking relief by way of an award and judgment for his pension benefits.

With regard to the implicit issues, Guidry believes it is clear that the Tenth Circuit abrogated implicit parts of the prior Supreme Court *Guidry* decision. This Court, within the four corners of its *Guidry* decision certainly dealt with the issues in the real world, namely, whether Guidry and his dependents deserved a pension. The Court stated that, "We see no meaningful distinction

between a writ of garnishment and the constructive trust remedy imposed in this case." *Id.* at 372, 110 S. Ct. at 685. The issue before the Tenth Circuit was whether a garnishment of Guidry's pension fund in a segregated account can be interrupted as "a stream of income." Certainly, this Court at least implicitly said "no" when it ruled that it saw no "meaningful distinction" between a writ of garnishment and the constructive trust remedy and that pensions are a "stream of income."

The law of the case doctrine should also control as to the scope of the ERISA anti-alienation clause itself. In its *Guidry* decision, this Court states that " . . . ERISA erects a general bar to garnishment of pension benefits from plans covered by the Act," and further states that this view is "consonant with other statutory provisions designed to safeguard retirement income." *Id.* at 372, 110 S. Ct. at 685. The Court then references in footnote 13 the prohibition to garnishment in the Social Security Act, the Railroad Retirement Act, the Civil Service Retirement Act and the Veterans' Benefits Act. If these Acts are consonant, then they should have been used by the Tenth Circuit as an interpretative aid, which required a different conclusion than that reached by the Court. The majority opinion of the first panel affirmed en banc, while recognizing that its decision "will undermine Congress' decision to ensure that pension benefits are actually received when due upon retirement and available for retirement purposes," goes on to cite these retirement laws. The en banc Court reasoned that, "Congress knew how draft a statute protecting benefits that had left the pension plan, and it did not use similar language with ERISA, § 206(d)(1)." *Id.* at 1083. The Tenth thus ignored this Court's *Guidry* decision

that ERISA § 206(d)(1), 29 U.S.C. § 1056(d) is "consonant" with these laws, *Id.* at 372, 110 S. Ct. at 685 n.13.

Unfortunately, the Tenth Circuit still considers, as it did in its reversed 1988 opinion, that Guidry's receipt of his pensions would be inequitable. This is clear from the dissent written by Circuit Justice Brorby regarding the application of the state law anti-garnishment provision in Colorado law, and whether such law was preempted. Judge Brorby also authored the unanimous part of the en banc decision, that held that the law of the case did not apply. It is quite clear by Judge Brorby's dissent that the receipt of any pension funds by Guidry is abhorrent. Judge Brorby opines that, "[T]he majority today has ruled that a thief is free to keep fruits of his crime under Colorado law." *Id.* at 1087. The judge goes so far as to quote from Mr. Bumble of *Oliver Twist* that, "If the law supposes that . . . the law is an ass – a idiot." *Id.* at 1089. The law of the case should apply to lower courts, whether such courts continue to see a result mandated by this Court as unjust or not.

This case gives this Court an opportunity to further strengthen upon the law of the case. In researching this issue, Guidry's counsel has found that, in recent years, this Court does not itself opine in detail on the law of the case doctrine.

II. EVEN IF THE LAW OF THE CASE DOES NOT APPLY, THE ERISA ANTI-ALIENATION CLAUSE AND ITS LEGISLATIVE HISTORY CLEARLY MANDATE THAT IDENTIFIABLE PENSION FUNDS ARE NOT GARNISHABLE.

The District Court in this matter, after remand from this Court, directly decided that the ERISA anti-alienation clause applies, "so long as the proceeds are clearly identified as such and have not been commingled with other funds or used for the acquisition of assets." Appendix, A-69. It has been stipulated here that all sums seized were clearly identifiable pension funds. Appendix, A-77-A-78.

The en banc panel found that the legislative history of § 206(d)(1) was "sparse and inconclusive," and found that there was no clear Congressional intent. *Id.* at 1082. Quite to the contrary, the legislative history is that the anti-alienation clause is "to . . . ensure that the employees accrued benefits are actually available for retirement purposes." House Report No. 93-807, reprinted in 1974 U.S.C.C.A.A. 4670, 4734. This Court has reviewed the legislative history of ERISA, holding that it was the intent of Congress to insure pension benefits will actually be received upon retirement by plan participants and beneficiaries, *Nachman Corp. v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361, 100 S. Ct. 1723, 1726, 64 L. Ed. 2d 354 (1980). This Court in *Patterson v. Shumate*, ___ U.S. ___, ___, 112 S. Ct. 2242, 2247, 119 L. Ed. 2d 519 (1992), in quoting the *Guidry* stream of income language, also held that the Court should be vigorous in enforcing ERISA's prohibition on assignment of alienation, and declined to recognize any implied exceptions to the broad statutory bar.

Both the majority decision and the en banc decision of the Tenth Circuit fail to note that the Treasury regulation under consideration itself contains a section in 26 C.F.R. § 1.401(a)-(13)(b) that, "Benefits provided under the plan may not be anticipated, assigned (either at law or in equity) alienated or subject to attachment, garnishment, levy, execution or any other legal or equitable process." The seized benefits of Guidry were "provided under the plan." ERISA regulations are in fact silent on the exact issue of garnishment outside the plan. Therefore, it was error for the Tenth Circuit to defer to regulations that do not even deal with the issue of the exempt nature of segregated pension benefits, once they are paid outside the plan. The reliance on regulations is also in error when there are stronger available aids to judicial interpretation, including other federal retirement acts and this Court's decision in this very case in 1990.

The distaste of the Tenth Circuit for Guidry is shown by its conclusion, even in light of the majority panel's admitted uncertainty, whether it was correctly interpreting the law. The majority in the initial Tenth Circuit decision admitted that the Treasury regulations support its conclusion only "inferentially." *Id.* at 711. Finally, and most compelling, the majority opinion, which was affirmed by the en banc panel, acknowledges that, "We are aware garnishment in the present context may thwart Congress' intent," *Id.* at 716, but then holds anyway that, "it must give deference to these silent regulations." The majority panel also acknowledges that "to some degree allowing the practice works an end-run around the anti-alienation provision." *Id.* at 711.

In 1990, when this Court issued its *Guidry* decision, the facts of Guidry's criminal conduct were already taken into account. The interpretation of the Tenth Circuit of the anti-alienation clause is still driven by its dislike for Guidry's conduct, as clearly shown in Judge Brorby's dissent. As noted earlier, Judge Brorby also wrote the main part of the en banc decision that affirmed the holding of the majority panel that the anti-alienation clause was inapplicable to post-receipt benefits.

If allowed to stand, the en banc panel's interpretation of ERISA will lead to many untoward events. Certainly, it was not the intent of Congress that, as long as a pensioner could not receive his or her pension, it was protected, but when it was available as a "stream of income," it suddenly is handed over to the creditor. As the majority en banc panel acknowledged, this led Guidry to argue before that panel that the "Employee Retirement Income Security Act of 1974" should be retitled the "Creditor Income Security Act of 1974." *Id.* at 705. The lower courts need direction on this very vital question.

III. SINCE THE CONGRESSIONAL PURPOSE IS THAT ACTUAL PENSION BENEFITS BE RECEIVED, GUIDRY SHOULD BE AWARDED HIS STATUTORY REASONABLE ATTORNEY FEES UNDER ERISA, SO THAT ATTORNEYS ARE ENCOURAGED TO PURSUE UNPOPULAR CASES AND SO THAT GUIDRY RECEIVES MORE THAN A PYRRHIC VICTORY.

The District Court refused under ERISA 29 U.S.C. § 1132(g)(1) to award attorney fees. The District Court again alludes to the unpopularity of Guidry, in holding

that the Union and Pension Funds are simply being diligent, to avoid "an apparent injustice resulting from the Supreme Court's preference for social policy of protecting plan benefits under ERISA over the traditional equitable powers of the courts to provide a remedy for those injured by criminal conduct." Appendix, A-70. The District Court then felt that it would not "add to the inequity by awarding attorney fees." Appendix, A-70. Our's is a nation of laws, and such laws apply even to unpopular persons. The nature of Guidry's conduct has been clear since the first Complaint was filed in this matter in 1984, since the Complaint itself identifies that Guidry is still incarcerated in a federal correctional institution, and that he had been denied funds because of his theft. In 1990, this Court held in *Guidry* that, "It makes little sense to adopt such a policy and then to refuse enforcement whenever enforcement appears inequitable." *Id.* at 376-377, 110 S. Ct. 687. Because of Guidry's efforts there have been numerous judicial decisions upholding the anti-alienation clause, though the Tenth Circuit continues to excoriate Guidry. The District Court did not even attempt to consider the five-part test on the award of attorney fees involving ERISA, contained in *Eaves v. Penn*, 587 F.2d 453, 465 (10th Cir. 1978).

While an award of attorney fees under 29 U.S.C. § 1132(g)(1) may be discretionary, the appellate Courts have made clear that ERISA is to be construed liberally, and that discretion has its limits. In *Chambless v. Masters, Mates & Pilots Pension Fund*, 815 F.2d 869 (2nd Cir. 1987), the Court held that, "ERISA's attorney fee provisions must be liberally construed to protect the statutory purpose of vindicating retirement rights, even when small

amounts are involved." *Id.* at 872. There, the Court of Appeals stated that the case law "looked not to Plaintiff's motive in bringing suit, but to the effect of Plaintiff's victory. It is the latter that is controlling." *Id.* at 872. Similarly, *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980).

The Tenth Circuit itself has set forth the five factors for considering attorney fees in *Eaves v. Penn*. They are, (a) the degree of each party's culpability, (b) the ability of a party to personally satisfy an attorney fee award, (c) whether an award of attorney fees would deter others from acting under similar circumstances, (d) whether the party requesting attorney fees resolved a significant legal issue, and (e) the relative merits of the parties' positions. Since the Supreme Court's decision in 1990, the equities in this case have in fact shifted to Guidry, since this Court explicitly, as well as implicitly, ruled that Guidry was entitled to his pension. Guidry or any pensioner should not be penalized for continuing to assert rights arising under law because of conduct which was admitted from filing of the Complaint in 1984, and for which Guidry has already served his criminal sentence. The dissent to the majority Tenth Circuit panel wrote that the Tenth Circuit was not "free to reinterpret the Section 206(d) ban on garnishments as it applies to garnishment of Guidry's pension benefits," and therefore, the case should be remanded "for additional findings on the refusal to allow attorneys fees." 10 F.3d at 718. The en banc panel held that it found "no grounds for reversing the district court's ruling Mr. Guidry was not entitled to a fee award." 39 F.3d at 1087 n.11.

Since an important policy issue has been decided by this Court and since the losing parties to the litigation continue to be recalcitrant, it is important on public policy grounds alone that the seeking of redress be encouraged by way of a thorough consideration of attorney fees.

IV. GUIDRY IN FACT PRESERVED HIS RIGHT TO ASSERT THE TEXAS STATE LAW BLANKET EXEMPTION.

While the en banc Tenth Circuit acknowledged the applicability of the 75% Colorado anti-garnishment state law, the Court refused to consider the applicability of the Texas blanket anti-garnishment provision, holding that Guidry had failed to preserve such issue before the District Court. Vernon's Tex. Prop. Code Title 5, § 42-0021(a) (1992). The Texas exemption is very important to Guidry, in that it preserves 100% of his pension to the extent of the approximate $190,000 in past due pension benefits, which were literally thrown at Guidry's feet there and seized in the Texas action. The parties had explicitly stipulated before the District Court that, "Guidry will be taken to have asserted any Texas state law exemptions to the funds derived from the Texas action." Appendix, A-79. It is important that the Texas statute be considered so that in fact Guidry might have as much of his pension as is possible, if ERISA does not apply.

CONCLUSION

The instant case offers an opportunity for the Court to reaffirm a basic principle, namely the law of the case, which will help to dampen endless litigation fostered on by attorneys' resourcefulness to give new clothing to old arguments.

It is important to affirm to the lower courts that the outcome to this dispute was contained within the four corners of that initial *Guidry* decision in its discussion of the policy of the law, legislative history and the broad scope of other federal acts designed to protect retirement benefits.

This case also raises important issues for determination of the relative merits of a statutory attorney fee award to Guidry who has, since 1990, attempted to not only preserve his pension, but to reaffirm the principle that lower courts are bound by the determination of this Court.

It is requested that this Petition be granted.

January 1995

Respectfully submitted,

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Curtis GUIDRY, Plaintiff-Appellee
and Cross-Appellant,

v.

SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION,LOCAL NO. 9,
Defendant-Intervenor-Appellant
and Cross-Appellee,

Sheet Metal Workers National Pension Fund;
Sheet Metal Workers' Local Unions and Councils
Pension Plan, Defendants & Cross-Appellees,

Sheet Metal Workers' Local No. 9 Pension
Fund, Party Under Rule 19, F.R.C.P., Defendant-
Intervenor and Cross-Appellee,

and

Edward J. Carlough; Robert T. Stringer;
C.T. Roff; Cavet Snyder; Edward J. Carlough;
Cecil D. Clay; George J. Cuddihy;
Urie E. Williams Jr.; Richard J. Scott,
Trustees, Defendants.

Nos. 92-1018, 92-1034.

United States Court of Appeals,
Tenth Circuit.

Nov. 4, 1993.

Union official convicted of embezzling union funds brought action against union to recover retirement benefits. The United States District Court for the District of Colorado, Richard P. Matsch, J., 641 F.Supp.380, ordered that constructive trust by imposed on benefits in union's favor. On appeal, the Court of Appeals for the Tenth Circuit, 856 F.2d 1457, affirmed. On certiorari, the Supreme Court, 493 U.S. 365, 110 S.Ct. 680, 107 L.Ed.2d

782, reversed and remanded. On remand, the Court of Appeals, Brorby, Circuit Judge, held that ERISA's anti-alienation provisions did not apply to pension benefits already paid.

Judgment of district court reversed.

Wesley E. Brown, Senior District Judge, dissented with opinion.

Eldon E. Silverman of Elrod, Katz, Preeo, Look, Moison & Silverman, P.C., Denver, CO, for plaintiff-appellee and cross-appellant.

Joseph M. Goldhammer (Ellen M. Kelman with him, on the briefs) of Brauer, Buescher, Valentine, Goldhammer & Kelman, P.C., Denver, CO, for defendant-intervenor-appellant and cross-appellee.

Raymond J. Sweeney (Ellen Ranzman and Michael Wolf of Katz & Ranzman, Washington, D.C., with him, on the brief) of Raymond J. Sweeney & Associates, North Andover, MA, for defendant-intervenor-appellant and cross-appellee.

Before TACHA and BRORBY, Circuit Judges, and BROWN,* Senior United States District Judge.

BRORBY, Circuit Judge.

The issue in this case is whether Employee Retirement Income Security Act of 1974 (ERISA) § 206(d)(1), 29 U.S.C. § 1056(d)(1) (1988), and its coordinate section in the Internal Revenue Code, I.R.C. § 40(a)(13)(A) (1986),

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* The Honorable Wesley E. Brown, Senior United States District Judge, District of Kansas, sitting by designation.

prohibit garnishment of Mr. Guidry's pension benefits after the benefits have been paid and received.

I. BACKGROUND

The relevant facts are undisputed.[1] Prior to 1981, appellee Curtis Guidry was the chief executive officer of appellant Sheet Metal Workers International Association, Local No. 9 (Local 9). As an employee of Local 9, Mr. Guidry was entitled to receive benefits from certain pension funds associated with Local 9. The litigation underlying this appeal began as an action for benefits brought by Mr. Guidry under ERISA against the cross-appellee Pension Funds (Pension Funds). The Pension Funds' defense to Mr. Guidry's claim for benefits was that he had forfeited the right to his pensions because of criminal misconduct against Local 9.

Local 9 intervened in the action asserting an interest in the property which was the subject of the litigation. That interest was based upon Local 9's common law and Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §§ 401-531 (1988), claims against Mr. Guidry. Local 9 asserted six claims against Mr. Guidry, five of which were settled by stipulation for entry of judgment. The claims for which a stipulation was signed included violation of fiduciary duties under 29 U.S.C.

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[1] For the complete background of this case, see *Guidry v. Sheet Metal Workers' Nat'l Pension Fund*, 641 F.Supp. 360 (D.Colo.1986); *Guidry v. Sheet Metal Workers Nat'l Pension fund*, 856 F.2d 1457 (10th Cir. 1988); and *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 110 S.Ct. 680, 107 L.Ed.2d 782 (1990).

§ 501(a); conversion; actual fraud; money had and received; and negligence. The stipulation entered a $275,000 judgment in favor of Local 9. Local 9's sixth claim for relief sought imposition of a constructive trust over any pension fund's due to Mr. Guidry and was not settled.

In this posture the case was heard by the district court. The district court and this court ultimately agreed Mr. Guidry was entitled to his pension under ERISA and that Local 9 was entitled to the imposition of a constructive trust under the LMRDA. *Guidry*, 641 F.Supp. at 360; *Guidry*, 856 F.2d at 1457. The United States Supreme Court, however, reversed the imposition of the constructive trust, ruling that the anti-alienation provisions of ERISA superseded Local 9's claim for a constructive trust. *Guidry*, 493 U.S. at 375-76, 110 S.Ct. at 686-87.

Pursuant to orders of remand, the district court entered judgment ordering payment of Mr. Guidry's back and future pension payments. The Pension funds then began making Mr. Guidry's monthly pension payments into an account which he established at the First Interstate Bank of Denver for that purpose. Subsequently, Local 9 made efforts to collect its judgment against Mr. Guidry both through monthly garnishment of the bank account at the First Interstate Bank and through a seizure of past due pension payments which were tendered to Mr. Guidry in Texas by the Pension Funds. With respect to the monthly payments, the Pension Funds and Local 9 arranged that a representative of the Pension Funds would make out a deposit slip to Mr. Guidry's account, and then Local 9 would seek to garnish the funds immediately after deposit. Mr. Guidry, in turn, attempted to

garnish certain accounts of Local 9 claiming the tender in Texas to be invalid.

The parties then entered into a series of stipulations concerning both the ongoing monthly pension payments and payments of past due amounts. The parties agreed that ongoing payments would be deposited into Mr. Guidry's First Interstate Bank account and would be subject to the initial garnishment filed by Local 9 without a formal garnishment each month. The parties also agreed to remove past due amounts from the Registry of the United States District Court for the Southern District of Texas, where they were stored after an attempted delivery by the pension funds to Mr. Guidry, and to deposit them into the First Interstate Bank account subject also to the initial garnishment. An additional stipulation authorized removal of some of the funds to two other financial institutions, but all funds remained subject to the initial garnishment.

Under the stipulations, the district court was presented with the issue of whether Local 9 was entitled, under ERISA, to garnish bank accounts designated as containing, and in fact containing, only the proceeds of pension payments received by Mr. Guidry. The district court held that the ERISA exemption from garnishment applies to pension proceeds "so long as the proceeds are clearly identified as such and have not been commingled with other funds or used for the acquisition of assets." The court stated that its decision was mandated by the law of the case, citing *Guidry*, 493 U.S. at 365, 110 S.Ct. at 680. The court also held that "[t]he attempt of the Funds to satisfy the judgment against them by the tender made

in Texas . . . was not a legally effective tender of payment of the judgment and is a nullity."

Upon receipt of the district court's order, Mr. Guidry removed all funds from the bank accounts which were subject to the stipulations of the parties.

II. CONTENTIONS OF THE PARTIES

The parties to this bitter and interminable litigation have locked horns yet again over the district court's order. Local 9 claims the anti-alienation protection of ERISA § 206(d)(1) does not extend to funds once the plan participant asserts dominion over them. In support Local 9 cites applicable Department of the Treasury regulations, principles of statutory construction, and the common law of trusts. Mr. Guidry, on the other hand, claims by the "law of the case" he is to receive his pension benefits and that the garnishment proceeding at issue here is contrary to the Supreme Court's mandate in *Guidry*.[2] It is also his position that the appeal is in part moot; that Local 9 conceded the issue in this case; and that in any event because the purpose of ERISA is to safeguard a stream of income, interdicting that income at the moment of payment is prohibited by ERISA § 206(d)(1). Mr. Guidry also claims alternative exemptions under state law, and cross-appeals claiming the district court erred in not awarding him attorney's fees under ERISA.

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[2] This citation and all citations to *Guidry infra* refer to the Supreme Court case.

III. MOOTNESS

Following the district court's order invalidating the writ of garnishment, Mr. Guidry removed the funds from the bank accounts that were subject to the stipulations of the parties. Local 9 sought a stay of the district court's order and return of the funds. Local 9's motions were denied and this court affirmed. Because the funds are no longer in the account, Mr. Guidry contends that this appeal is at least in part moot. We disagree. As to future benefit payments to be received by Mr. Guidry, the parties agree this appeal presents a live issue. Mr. Guidry concedes that "even if the anti-alienation issues are decided adversely to [Mr.] Guidry, the effect would not be moot, since it would apply to all subsequent payments to [Mr.] Guidry during his lifetime." As to the past payments, including the lump sum originally tendered in Texas and ultimately paid in Colorado, Local 9's claim is only moot, as Mr. Guidry contends, if this court is without the power to order a return of the past payments or if it presupposes facts not in the record to the effect that the payments have been dissipated and cannot be returned. We decline to make either finding. Without commenting on the shape of any appropriate relief that might be granted by the district court on remand from this decision, we find this appeal justiciable.

IV. LAW OF THE CASE

The district court held the "law of the case" compelled it to bar garnishment of the pension benefits received by Mr. Guidry, the reason offered being that since the Supreme Court ordered Mr. Guidry receive a

"stream of income," it is impermissible to garnish pension income paid and received by Mr. Guidry and in an account established by him for the receipt of those funds. In defending this conclusion, Mr. Guidry rather colorfully states that if his pension may be garnished after received:

> [t]he "Employee Retirement Income Security Act of 1974" should be retitled the "Creditor Income Security Act of 1974," since pensions become simply a fund that cannot be touched by either the debtor/worker or the creditor, until the debtor's retirement at which time it matures into a fund for the creditor, not the pensioner.

In support, he recites from *Guidry*, as follows:

> [ERISA] [s]ection 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.

Guidry, 493 U.S. at 376, 110 S.Ct. at 687.

We now consider this contention. The "law of the case" doctrine requires every court to follow the decisions of courts that are higher in the judicial hierarchy. *Mason v. Texaco, Inc.*, 948 F.2d 1546, 1553 (10th Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1941, 118 L.Ed.2d 547 (1992); *Heathcoat v. Potts*, 905 F.2d 367, 370 (11th Cir.1990); *see generally* 18 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 4478 (1993). The doctrine applies to issues previously decided,

Quern v. Jordan, 440 U.S. 332, 347, n. 18, 99 S.Ct. 1139, 1148, n. 18, 59 L.Ed.2d 358 (1979), either explicitly or by necessary implication. *Heathcoat*, 905 F.2d at 370; *Cherokee Nation v. Oklahoma*, 461 F.2d 674, 678 (10th Cir.), *cert. denied*, 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 489 (1972). When further proceedings follow a general remand, the lower court is " 'free to decide anything not foreclosed by the mandate' " issued by the higher court. *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 971 (10th Cir.1991) (quoting 1B J. Moore, J. Lucas, T. Currier, Moore's Federal Practice ¶ 0.404[10] (1988)).

A. Not explicitly decided.

The "law of the case" did not compel the district court to bar the garnishment proceedings in this case. The issue was not decided because no benefits had been paid to Mr. Guidry at the time the supreme Court decided his case. The Supreme Court, in considering a constructive trust, (1) held that ERISA § 206(d)(1) applied to garnishment proceedings, *Guidry*, 493 U.S. at 371-72, 110 S.Ct. at 684-85; and (2) reversed the imposition of a constructive trust over the pension benefits of Mr. Guidry in the plan, *id.* at 376-77, 110 S.Ct. at 687. This case, in contrast, involves a writ of garnishment issued by a Colorado Court upon the garnishee, First Interstate Bank, subjecting the pension funds of Mr. Guidry in the account to the process of garnishment. This case, therefore, is factually, distinct from *Guidry* in the critical respect that the garnishment process is over funds that Mr. Guidry has received, whereas the constructive trust invalidated by *Guidry* was over benefits in the plan. The validity of the post-payment garnishment proceeding was not resolved

because no pension benefits had been paid to Mr. Guidry at the time the case was decided. *Cf. Chapman v. National Aeronautics & Space Admin.*, 736 F.2d 238, 242 (5th Cir.), *cert. denied*, 469 U.S. 1038, 105 S.Ct. 517, 83 L.Ed.2d 406 (1984) (appellate court did not intend to decide a factual issue not within its province).

Likewise, the Supreme Court did not explicitly decide in dicta that its holding with respect to the constructive trust extended as well to benefits paid from the plan and received by the participant.[3] We look first at the phrase: "stream of income." *Guidry* states the purpose of ERISA § 206(d)(1) is to safeguard a "stream of income." It is apparently Mr. Guidry's contention that a "stream of income" is neither a "stream" nor an "income" if it is garnished at the moment of payment.[4] A natural reading of this language, however, is that Mr. Guidry has a right to receive periodic retirement payments due him under the pension plan. The periodic payments are the "stream of income." Moreover, the income is "safeguarded" even if it is garnished upon payment insofar as the right to receive payments is secure. As *Guidry* refers only to a "stream of income" that must be received, and not to the

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[3] It would be improper for this court to limit Supreme Court opinions to precisely the facts of each case. *McCoy v. Massachusetts Inst. of Technology*, 950 F.2d 13, 19 (1st Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1939, 118 L.Ed.2d 545 (1992). If dicta had clearly resolved the issue in this appeal we would be bound by that decision.

[4] Mr. Guidry relies heavily on the "stream of income" phrase, but is not specific as to why this phrase controls this case. We presume Mr. Guidry intended to make this and other related arguments.

disposition of the income after it was received, we fail to see how the "law of the case" bars garnishment of received income. The payments do not lose their character as income because they are used to satisfy debts.

Next, we consider the Supreme Court's language: "Section 206(d) reflects a considered congressional policy . . . even if that decision prevents others from securing relief for the wrongs done them." *Guidry*, 493 U.S. at 376, 110 S.Ct. at 687. Mr. Guidry apparently claims this language decided Local 9 was prevented from securing relief by means of garnishment generally. In Mr. Guidry's opinion, the Court decided that he won and Local 9 lost, and therefore any further attempt of Local 9 to garnish income received by Mr. Guidry under the pension plan is barred. This reading misstates *Guidry*. The quoted passage in plain terms refers only to the decision of that case. As the opinion contains no language barring Local 9 from seeking other relief against Mr. Guidry, such action is not foreclosed by the "law of the case." The Court did not decide Local 9 was generally not entitled to relief, but only that the type of relief selected by the district court and approved by this court, a constructive trust, was impermissible even if a rightful creditor was thereby deprived of a remedy.

Finally, if the court had intended to explicitly decide that income could not be garnished after payment, it would have stated the conditions under which such income retained its protected status. *See Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 416, 93 S.Ct. 590, 592, 34 L.Ed.2d 608 (1973) (payments retain character as protected monies so long as available for use and not converted into permanent investments); *Porter v. Aetna*

Casualty & Sur. Co., 370 U.S. 159, 162, 82 S.Ct. 1231, 1233, 8 L.Ed.2d 407 (1962) (same).

B. Not implicitly decided.

We discern three grounds under the "law of the case" doctrine by which we might conclude an issue was implicitly resolved in a prior appeal, as follows: (1) resolution of the issue was a necessary step in resolving the earlier appeal; (2) resolution of the issue would abrogate the prior decision and so must have been considered in the prior appeal; and (3) the issue is so closely related to the earlier appeal its resolution involves no additional consideration and so might have been resolved but unstated.[5]

The first ground is not even arguably present in this case. The Supreme Court reversed the imposition of a constructive trust over funds in the possession of the fund trustee. This decision did not rely upon, nor did it reach in any way as a predicate, the impact of ERISA § 206(d)(1) on benefits already paid to a plan participant. As such, resolution of the issue in this case was not a necessary element of the decision in the prior appeal.

The second ground is a closer matter. Would garnishment of Mr. Guidry's retirement income after he receives the income abrogate the prior appeal? Mr. Guidry claims

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[5] *Cherokee* held that the doctrine of the "law of the case" applies to issues implicitly resolved. While we agree, there is little guidance in the law to explain the circumstances under which an issue may be implicitly resolved. The recited factors are not intended to be exhaustive.

"the *Guidry* decision [would be] gutted, if a pension fund were allowed to pay benefits into a bank account, with the judgment debtor immediately then garnishing those funds." This argument, however, pertains to the purpose of ERISA, not to the "law of the case" doctrine. While it might be consistent with *Guidry* to bar garnishment of Mr. Guidry's received benefits, the "law of the case" applies only to what was actually decided, either explicitly or implicitly. An issue was implicitly decided if its resolution would necessarily abrogate the effect of the prior appeal, but not if one resolution or another would merely be consistent with the prior outcome. Here, Mr. Guidry is incorrect that a decision allowing garnishment would necessarily abrogate *Guidry* because *Guidry* would still protect his benefits in the pension plan.

Such protection is not worthless, as Mr. Guidry believes; in fact, it is similar in effect to a common law spendthrift trust. Under the common law "[a] spendthrift trust . . . does not involve any restraint on alienability or creditors' rights with respect to property after it is received by the beneficiary from the trustee, but rather is merely a restraint with regard to his rights to future payments under the trust." *George T. Bogert, Trusts,* § 40 at 148-49 (6th ed., 1987). And,

> [i]t has never been the object of the spendthrift trust to restrain the beneficiary from spending income or principal after it has been paid to him by the trustee, or to restrain his creditors from taking trust income or principal from him after he has obtained it from the trustee. The sole object of these trusts is to prevent anticipation of trust income or principal by assignments of the right to receive future income or principal or

> from attempts by creditors of the beneficiary to reach such right.

Id. at 149-50. Accordingly, Mr. Guidry's argument that garnishment of his received benefits would abrogate *Guidry* and render ERISA § 206(d)(1) meaningless is mere hyperbole.

The third potential ground is also not satisfied. A different balancing of interests is involved in this appeal than in *Guidry*. In *Guidry* the court balanced equitable considerations against the clear language of the statute. Here, the statute is not clear, as discussed *infra*, and moreover a different weighing of factors may be appropriate in a case where the pension income to be protected has been received than is appropriate in a case where the benefits are still in the plan. Thus, whether we characterize ERISA § 206(d)(1) as an absolute bar to garnishment of income so long as the income retains its character as monies. *Philpott*, 409 U.S. at 416, 93 S.Ct. at 592, or as a bar to the alienation of benefits in the plan, policy choices are involved beyond those implicated by *Guidry*. For the foregoing reasons, we conclude the issue on this appeal was neither explicitly nor implicitly resolved by that case.

V. INTERPRETATION OF THE STATUTE

It is not the "law of the case" that ERISA § 206(d)(1) bars garnishment of Mr. Guidry's benefits after they have been received; therefore the text of ERISA § 206(d)(1) is controlling. In statutory interpretation we look to the plain language of the statute and give effect to its meaning. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989); *Ute Distribution Corp. v. United States*, 938 F.2d 1157, 1162

(10th Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2273, 119 L.Ed.2d 200 (1992). The objective of reading the statute is to determine the intent of Congress. *Davidowitz v. Delta Dental Plan of California*, 946 F.2d 1476, 1480 (9th Cir.1991) ("Any construction of ERISA . . . must be consistent with Congressional intent."). The text of the statute itself is the best evidence of that intent. *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98, 111 S.Ct. 1138, 1146, 113 L.Ed.2d 68 (1991). If the statute is clear, that is the end of our inquiry. *Aulston v. United States*, 915 F.2d 584, 589 (10th Cir.1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2011, 114 L.Ed.2d 98 (1991).

The statute is not clear. ERISA § 206(d)(1) states: "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." The unclear language is the phrase: "benefits provided under the plan." The issue is whether "benefits provided under the plan," in ERISA § 206(d)(1), means the right to future payment or the actual money paid under the plan and received by the beneficiary. If "benefits" in ERISA § 206(d)(1) means the right to future payments, then the garnishment of money paid out to Mr. Guidry would not be covered. If, however, "benefits" means the actual money paid to Mr. Guidry, then the funds would initially be protected by this statute.

The term "benefits" is not clear. Accordingly, we must look elsewhere to decide what meaning of "benefits" Congress had in mind in ERISA § 206(d)(1).

VI. AGENCY REGULATIONS

The Department of the Treasury has issued regulations defining "assignment" and "alienation." 26 C.F.R.

§ 1.401(a)-13(c) (1992) [hereinafter "ERISA Regulations"]. The ERISA Regulations define "assignment" and "alienation" as "[a]ny direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary *a right or interest enforceable against the plan* in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary." 26 C.F.R. § 1.401(a)-13(c)(1)(ii) (emphasis added).

A. Applicability of Regulations to ERISA § 206(d)(1).

The authority of the Department of the Treasury to issue regulations applicable to ERISA § 206(d)(1) is complex. Congress delegated broad authority to the Secretary of Labor to publish regulations under ERISA. 29 U.S.C. § 1135. However, because coordinate sections are codified in the Internal Revenue Code (I.R.C.), Congress delegated to the Department of the Treasury the authority to issue regulations applicable to some of the coordinate sections of ERISA and the I.R.C. 29 U.S.C. § 1202(c).[6] The section at issue in this case, ERISA § 206(d)(1), was not included

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[6] The coordinate sections in the I.R.C. are substantially identical to the ERISA sections codified in the Labor Code. For example, ERISA § 206(d)(1) states:

> Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

And I.R.C. § 401(a)(13)(A) states:

> A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may be assigned or alienated.

in the delegation to the Department of the Treasury. *Id.* The section is, however, in the same category as that delegation (participation, vesting, and funding). ERISA Subchapter I, Subtitle B, Parts 2 and 3; 29 U.S.C. §§ 1051-1086. *See generally Baker v. Otis Elevator Co.*, 609 F.2d 686, 690-91 n. 7 (3rd Cir.1979).

Notwithstanding 29 U.S.C. § 1202(c), the authority to issue regulations concerning ERISA § 206(d)(1) and I.R.C. § 401(a)(13)(A) is now lodged in the Department of the Treasury. In 1978, President Carter, pursuant to the Reorganization Act of 1977, 5 U.S.C. §§ 901-912, issued Reorganization Plan No. 4, § 101, *reprinted in* 1978 U.S.C.C.A.N. 9814, transferring the authority of the Department of Labor to issue regulations under certain ERISA sections to the Department of the Treasury, including the authority to issue regulations under ERISA § 206(d)(1). The validity of the transfer, however, was subject to question because the Reorganization Act contained a legislative veto provisions, 5 U.S.C. §§ 903, 906(a), which was possibly unconstitutional after *I.N.S. v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983). *See E.E.O.C. v. CBS, Inc.*, 743 F.2d 969 (2d Cir.1984) (the unconstitutional legislative veto provision was not severable and the entire act was unconstitutional). We need not delve into these complicated issues, however, as the issues were mooted for the purposes of this case by an act of Congress, Pub.L. 98-532, 98 Stat. 2705 (1984), that ratified and affirmed each reorganization plan implemented to that date, including Reorganization Plan NO. 4. *See generally E.E.O.C. v. First Citizens Bank*, 758 F.2d 397, 399-400 (9th Cir.), *cert. denied*, 474 U.S. 902, 106 S.Ct. 228, 88 L.Ed.2d 228 (1985). Accordingly, the authority of the

Department of Labor to issue regulations under ERISA § 206(d)(1) is now lodged in the Department of the Treasury. *Hurwitz v. Sher,* 982 F.2d 778, 779 n. 1 (2d Cir.1992), *cert. denied,* ___ U.S. ___, 113 S.Ct. 2345, 124 L.Ed.2d 255 (1993) (No. 92-1572). Other cases have applied the ERISA Regulations for similar and related reasons. *See Retirement Fund Trust of Plumbing v. Franchise Tax Bd.,* 909 F.2d 1266, 1285 (9th Cir.1990); *General Motors Corp. v. Buha,* 623 F.2d 455, 462 (6th Cir.1980); *Baker,* 609 F.2d at 690-91; *Commercial Mortgage Ins. Inc. v. Citizens Nat'l Bank,* 526 F.Supp. 510, 519-20 (N.D.Texas 1981). The Supreme Court has likewise recognized the applicability of the ERISA Regulations, but has not interpreted them. *Guidry,* 493 U.S. at 372, 110 S.Ct. at 685 (the Court decided ERISA § 206(d)(1) applied to garnishment and stated that its decision was consistent with applicable regulations).

The regulations issued by the Department of Labor also provide the rules governing I.R.C. § 401(a)(13)(A) are applicable to ERISA § 206(d)(1). The Department of Labor regulations provide that the "ERISA Guidelines" include the regulations issued by the Department of the Treasury for I.R.C. § 401(a)(13)(A) and that the ERISA Guidelines "govern the application of (1) the qualification requirements of the Internal Revenue Code of 1954 . . . added or amended by ERISA, and (2) the requirements of the provisions of parts 2 and 3 of Title I of ERISA paralleling such qualification requirements". 29 C.F.R. § 2509.75-10 (compendium of authoritative rules) (1992). We conclude the ERISA Regulations are applicable to ERISA § 206(d)(1).

B. Application of the Regulations.

In the absence of clear Congressional intent, we defer to the applicable ERISA Regulations if they are reasonable and are not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984); *see Tataranowicz v. Sullivan*, 959 F.2d 268, 275 (D.C.Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 963, 122 L.Ed.2d 120 (1993); *Retirement Fund Trust*, 909 F.2d at 1284. The meaning of the ERISA Regulations is clear. ERISA § 206(d)(1) requires pension plans to prohibit assignment and alienation of pension benefits. The terms "assignment" and "alienation" are defined by the ERISA regulations as "[a]ny . . . arrangement . . . whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan." 26 C.F.R. § 1.401(a)-13(c)(1)(ii). Local 9 seeks only to enforce a judgment against Mr. Guidry by garnishing his bank account containing pension benefits paid and received; Local 9 does not seek to enforce an interest or right against the plan. Because garnishment of Mr. Guidry's received retirement income is not an action against the plan, we conclude it is not prohibited by ERISA § 206(d)(1) as implemented by the ERISA Regulations. *Cf. Usery v. First Nat'l Bank*, 586 F.2d 107, 108-09 (9th Cir.1978) (discussing anti-garnishment provision of the Consumer Credit Protection Act, 15 U.S.C. § 1673(a), and noting that the section is not limited to garnishment of the employer). We may disregard the plain meaning of

the ERISA Regulations only if we find they are unreasonable.[7]

C. Regulations are reasonable.

To determine if the ERISA Regulations are reasonable we look at the same criteria we would consider in interpreting the statute if the ERISA Regulations were absent, including the structure of the statute as a whole, and the objective of the statute. *See Crandon v. United States,* 494 U.S. 152, 158, 110 S.Ct. 997, 1001, 108 L.Ed.2d 132 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."); *Colorado v. Idarado Mining Co.,* 916 F.2d 1486, 1494 (10th Cir.1990) ("[w]e may consult legislative history as a secondary source of a statute's meaning."), *cert. denied,* 499 U.S. 960, 111 S.Ct. 1584, 113 L.Ed.2d 648 (1991).

1. Structure of ERISA.

The meaning of an unclear section a statute may be clarified by its content within the statute as a whole. *King v. St. Vincent's Hosp.,* ___ U.S. ___, ___, 11 S.Ct. 570, 574, 116 L.Ed.2d 578 (1991) words have only a communal existence); *Crandon,* 494 U.S. at 158, 110 S.Ct. at 1001 (we consider not only "the particular statutory language, but . . . the design of the statute as a whole").

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[7] Mr. Guidry did not address the application of the Regulations to this case.

There are few textual clues to the intended reach of ERISA § 206(d)(1) in other section of ERISA. One of the few is ERISA § 206(d)(3)(A), a specific exception to ERISA § 206(d)(1). The exception relates to certain domestic relation orders. It states: "[p]arapraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit *payable with respect to a participant* pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order." (Emphasis added.) The term "qualified domestic relations order" is defined as an order "which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the *benefits payable with respect to a participant under a plan.*" ERISA § 206(d)(3)(B) (emphasis added).

Although the above exception casts shadows over ERISA § 206(d)(1), it does not conclusively establish the intended scope of the anti-alienation provision. Because the exception is for certain benefits payable under the plan, ERISA § 206(d)(1) clearly prohibits alienation of benefits prior to payment as a general matter. The exception, however, is silent as to benefits already paid. It could be inferred from the omission of paid benefits that ERISA § 206(d)(1) does not prohibit alienation of such benefits generally. The inference would be warranted if it was clear an exception for paid benefits was necessary to achieve the purpose of ERISA § 206(d)(3)(A). In this instance, however, that is not clear, and no strong inference about the intended scope of ERISA § 206(d)(1) from the exception is warranted. It is unclear whether Congress omitted benefits already paid from ERISA

§ 206(d)(3)(A) because such benefits were not protected by ERISA § 206(d)(1) in the first place, or because benefits already paid were unrelated to the purpose of ERISA § 206(d)(3)(A). Without clear textual support we are hesitant to draw a conclusion. All we find is that the exception does not render the meaning of ERISA § 206(d)(1) clear, but is at least consistent with the ERISA Regulations, and may support them inferentially.

Another shadow-casting section is ERISA § 206(d)(2), a specific exemption to ERISA § 206(d)(1) for assignments of no more than ten per cent of a benefit payment. According to legislative history for this section, "a plan must provide that benefits under the plan may not be assigned or alienated. However, the plan may provide that after a benefit is in pay status, there may be a voluntary revocable assignment (not to exceed 10 percent of any benefit payment)." House Conference Rep. No. 93-1280, *reprinted in* 1974 U.S.C.C.A.N. 4639, 5038, 5061. Because the legislative history refers to "after pay status" a may be inferred that Congress intended ERISA § 206(d)(1) to protect benefits in payment. Although this inference is warranted, it does not reveal whether the protection was for benefits in the plan or for benefits received by the participant, or both. The phrase "pay status" seems to refer to the status of the participant and his right to receive benefits rather than to benefits that have been paid and received. Likewise, the term "assignment" suggests a diversion of part of a payment coming from the plan, rather than the assignment of part of a benefit already received. The purpose of the section apparently is to allow a plan participant to order a diversion of some of the payments coming from the plan.

Because the exception does not plainly cover benefits received it does not clearly reveal the intended effect of ERISA § 206(d)(1) generally. We conclude only that it is at least consistent with the ERISA Regulations insofar as it appears primarily concerned with benefits in payment before they are received by the assigning participant.

2. Objective of ERISA.

ERISA is a comprehensive statute. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361, 100 S.Ct. 1723, 1726, 64 L.Ed.2d 354 (1980), intended in significant part to ensure pension benefits will actually be received upon retirement by plan participants and beneficiaries. *Id.* at 374-75, 100 S.Ct. at 1732-33. The Court has consistently protected this purpose by "vigorously . . . enforc[ing] ERISA's prohibition on the assignment or alienation of pension benefits, [and] declining to recognize any implied exceptions to the broad statutory bar." *Patterson v. Shumate*, ___ U.S. ___, ___, 112 S.Ct. 2242, 2247, 119 L.Ed.2d 519 (1992). The purpose of the alienation provision was "[t]o . . . ensure that the employee's accrued benefits are actually available for retirement purposes." House Report No. 93-807, *reprinted in* 1974 U.S.C.C.A.N. 4670, 4734; *Misic v. Building Serv. Employees Health & Welfare Trust*, 789 F.2d 1374, 1376-77 (9th Cir.1986).

Are the Regulations so inconsistent with this purpose that they are unreasonable? This is a close question. To some degree allowing garnishment of retirement income that has been paid to the plan participant will undermine

Congress' desire to ensure that pension benefits are actually received when due upon retirement and available for retirement purposes. Likewise, to some degree allowing the practice works an end-run around the anti-alienation provision. *Cf. Hisquierdo v. Hisquierdo,* 439 U.S. 572, 583, 99 S.Ct. 802, 809, 59 L.Ed.2d 1 (1979) (order to pay benefits as received is contrary to Railroad Retirement Act, 45 U.S.C. § 231m, and mechanically deprives beneficiary of benefits Congress intended for the beneficiary to receive alone).[8] However, while sheltering retirement income received by a plan participant would apparently be consistent with ERISA, it would be improper for this court to invalidate the applicable agency regulations based exclusively upon a judgment that the other of the two permissible interpretations of the statute is more consistent with the overall Congressional scheme. It is a rule of statutory construction that "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it

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[8] *Hisquierdo* does not control the outcome of this appeal as it interprets a different statute. The garnishment provision in that statute referred to "any circumstances whatsover" and so provided more support for extending protection to benefits that had been paid. Section 231m(a) reads as follows:

> Except as provided in subsection (b) of this section and the Internal Revenue Code of 1954 [26 U.S.C.A. § 1 et seq.], notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated.

frustrates rather than effectuate legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526, 107 S.Ct. 1391, 1393, 94 L.Ed.2d 533 (1987). "[N]o legislation pursues its purposes at all costs." *Id.* at 525-26, 107 S.Ct. at 1393. Although it is clear Congress intended to protect pension benefits, it is unclear how far the protection was extended. The statute did not decide whether participants have priority over creditors seeking to garnish retirement income after it has been paid and received.[9] Therefore, although the ERISA Regulations are not necessarily the interpretation this court would have adopted as an original matter, they are permissible in light of Congress' failure to be specific.

We also find the Regulations are consistent with Congress' approach to the same problem in other income protection statutes. In other statutes, Congress explicitly exempted from garnishment benefits that had been paid and received by the beneficiary. For example, the Social Security Act, 42 U.S.C. § 407(a) (1988), provides:

> (a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity,

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[9] Although the parties have not extensively briefed the legislative history of ERISA, we have uncovered no conclusive evidence Congress specifically intended the opposite of the result adopted in the ERISA Regulations. The legislative history for ERISA § 206(d)(1) has been described by courts as sparse and inconclusive *Coar v. Kazimir*, 990 F.2d 1413, 1420 (3d Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 179, 126 L.Ed.2d 138 (1993); *Ellis Nat'l Bank v. Irving Trust Co.*, 786 F.2d 466, 470 (2d Cir.1986); *Buha*, 623 F.2d at 460.

> and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

And similarly, the Veterans' Benefits Act, 38 U.S.C. § 5301(a) (1991) provides:

> Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.

Because Congress did not include similar explicit language protecting benefits in the related context in ERISA, we infer Congress made a deliberate decision retirement income paid and received was not thereafter protected from garnishment. A similar argument was made by then Judge Kennedy writing for the Ninth Circuit in denying application of the anti-garnishment provision of the Consumer Credit Protection Act to wages that had been paid. *Usery*, 586 F.2d at 111. Although not conclusive, the absence of explicit language extending to paid benefits supports the ERISA Regulations.

For the foregoing reasons, we are not prepared to say that the interpretation of ERISA § 206(d)(1) in the ERISA Regulations is fundamentally antithetical to the intent of Congress or is otherwise unreasonable. The issue in this

appeal involves a pure legislative choice, and as we are unable to determine whether Congress made the choice, we will defer to the agent of the legislature.

Lastly, we note this Circuit has not already decided this issue.[10] The parties also cite *Tenneco Inc. v. First Virginia Bank*, 698 F.2d 688 (4th Cir.1983), which briefly referenced an issue somewhat similar to that here. *Tenneco* is not helpful, however, as it refers to assets which had been commingled with other funds. *Id.* at 691.

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[10] Local 9 cites *In re Harline*, 950 F.2d 669 (10th Cir.1991), *cert. denied*, ___ U.S. ___ 112 S.Ct. 2991, 120 L.ED.2d 869 (1992), in which the court considered whether 11 U.S.C. § 541(c)(2) included both state and federal law in the definition of applicable nonbankruptcy law. The section excludes certain interests in trust assets from a debtors' estate. The court held ERISA was applicable, and considered whether its decision rendered 11 U.S.C. § 522(d)(10)(E) superfluous or meaningless. That section provides, *inter alia*, some protection for necessary income. We stated that § 522 was not meaningless even if ERISA was applicable because "[s]ection 522 deals with *distributions* made from a pension plan . . . [and] [e]ven if pension plan assets in the hands of a trustee are beyond the reach of creditors because not a part or the debtor's estate under § 541(c)(2), distributions made from the plan to the debtor would not enjoy such protection, in the absence of exemption under § 522(d)(10)(E)." *Harline*, 950 F.2d at 675. This appeal is not related to *Harline*. The *Harline* court only stated, in dicta, that if pension plan assets in the hands of the trustee are beyond the reach of creditors because of § 541, distributions from the plan may yet be protected by § 522. We mention *Harline* only to clarify for the purpose of this appeal it is inapposite.

VII. ADDITIONAL CLAIMED EXEMPTIONS

Mr. Guidry claims additional exemptions for the pension funds in the alternative to ERISA § 206(d)(1).

A. Colorado Statutes.

Mr. Guidry claims that his pension benefits paid and received are exempted from garnishment by C.R.S. § 13-54-104 (1987 & Supp.1992). That section is applicable to "restrictions on garnishment" and provides that "the maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment . . . may not exceed twenty-five percent of his disposable earnings for that week." It further defines "earnings" (of which disposable earnings are a subset) as "compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, *avails of any pension or retirement benefits,* or deferred compensation plan."[11] (Emphasis added).

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[11] For actions commenced on or after May 1, 1991, a new definition of "earnings" is applicable which does not refer to pension benefits. *See* Colo.R.Civ.P. 103, Section 1 & Section 3, Committee Comment (Supp.1992) ("The Colorado Legislature amended Sections 13-54-104 and 13-54.5-101, C.R.S. (Section 7 of Chapter 65, Session Laws of Colorado 1991), which changed the definition of 'earnings' applicable only to actions commenced on or after May 1, 1991. The amendment impacts the ability to garnish certain forms of income, depending upon when the original action was commenced.") The amended section defines "earnings" as "[c]ompensation paid or payable for personal services, whether denominated as wages, salary, commission, or bonus; [or] . . . [f]unds held in or payable from any health, accident, or disability insurance." It further provides that "[f]or

The Colorado statute is preempted by ERISA. ERISA § 514(a) preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C.A. § 1144(a) (1985). ERISA preemption is broad. *Metropolitan Life Ins. Co. v. Hanslip*, 939 F.2d 904 (10th Cir.1991). A law " 'relate[s] to' a covered employee benefit plan for purposes of [ERISA] § 514(a) 'if it has a connection with or reference to such a plan.' " *District of Columbia v. Greater Washington Board of Trade*, ___ U.S. ___, ___, 113 S.Ct. 580, 583, 121 L.Ed.2d 513 (1992) (citing cases). Accordingly, ERISA § 514(a)

> pre-empts any state law that refers to or has a connection with covered benefit plans (and that does not fall within a[n] [ERISA] § 514(b) exception) "even if the law is not specifically designed to affect such plans, or the effect is only indirect," and even if the law is "consistent with ERISA's substantive requirements."

Id. (citations omitted).

The Colorado exemption statute "relates to" employee benefit plans because it expressly refers to such plans. The applicable section, C.R.S. 13-54-104(1)(b), defines earnings as the "avails of any pension or retirement benefits, or deferred compensation plan." Because it is specifically applicable to ERISA pension plans it is preempted by ERISA § 514(a).

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the purposes of writs of garnishment which are the result of a judgment taken for arrearages for child support or for child support debt, 'earnings' also means workers' compensation benefits and any pension or retirement benefits." We express no opinion with respect to the amended statute as the original action in this case was commenced before May 1, 1991.

It is not incongruous to hold, as we have done, that: (1) ERISA § 206(d), as implemented by the ERISA Regulations, does not prohibit garnishment of plan benefits paid and received; and (2) ERISA § 514(a) preempts state laws exempting such benefits from the general application of state garnishment laws. Congress was aware that ERISA benefits could be garnished – as evidenced by its adoption of ERISA § 206(d)(1) – and its decision to remain silent concerning garnishment of benefits paid and received prohibits state regulation of the practice. *Cf. Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837, 108 S.Ct. 2182, 2189, 100 L.Ed.2d 836 (1988) (discussing Congress' silence with respect to garnishment of welfare plan benefits and holding that Congress' silence " 'acknowledged and accepted the practice, rather than prohibiting it' "). This is particularly true in light of the applicable ERISA Regulations. In addition, the garnishment exemption is preempted by ERISA § 514(a) because it singles out ERISA benefits for special treatment. It is this singling out that preempts the Colorado anti-garnishment exception.[12] *Cf. Mackey*, 486 U.S. at 838 n. 12, 108 S.Ct. at 2190 n. 12. Likewise, the fact that this case is about paid benefits, and not about benefits in the plan, does not take the Colorado statute out of ERISA § 514(a). A statute relating to benefits paid and received is a state law relating to an employee benefit plan.

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[12] Mr. Guidry has made no claim that the state garnishment proceeding is preempted by ERISA § 514(a) and we do not consider the issue. *See generally Mackey*, 486 U.S. at 829, 108 S.Ct. at 2185 (state garnishment proceedings not preempted).

Mr. Guidry also claims that Colorado's 100% asset exemption, C.R.S. § 13-54-102 (1987) & Supp.1992), prohibits garnishment of his received benefits. That section is applicable to "exempt property" and provides that "[t]he following property is exempt [from garnishment[13] . . . (1)(s) [p]roperty, including funds, held in or payable from any pension or retirement plan or deferred compensation plan, . . . including pensions or plans which qualify under the federal 'Employee Retirement Income Security Act of 1974' as an employee pension benefit plan."

Although this statute expressly refers to pension benefits, we decline to interpret C.R.S. § 13-54-102, or to consider if it is preempted by ERISA, because Mr. Guidry has not persuaded the court that it is applicable. The Colorado Session Law adopting amended subsection (1)(s) provided that the amendments were effective to writs of garnishment issued by a court in any action brought on or after May 1, 1991. Section 7 of Chapter 65, Session Laws of Colorado 1991. The Committee Comment to the Colorado Rules of Civil Procedure clarifies that the term "action" refers to the "original action," meaning the action giving rise to the garnishment proceeding.

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[13] Although C.R.S. § 13-54-102 only refers to attachment and execution, other sections of the Title provide that the exemptions apply to garnishment actions. C.R.S. § 13-54-106(3) provides that: "[t]he exemptions provided by this article shall extend and apply to writs of attachment, execution, and garnishment issued out of any court of record." And, C.R.S. § 13-54.5-103 provides that, with respect to garnishment proceedings, "the exemptions from garnishment required or allowed by law, including but not limited to exemptions provided by sections 13-54-102 and 13-54-104 and 15 U.S.C. sec. 1671 et seq., shall apply to all garnishments."

Colo.R.Civ.P. 103, Section 1 & Section 3, Committee Comment (Supp.1992). Because the original action in this case was initiated well before May 1, 1991, we hold that C.R.S. § 13-54-102(1)(s) is not applicable to this case.

B. Texas Exemption and Federal Consumer Credit Protection Act.

Mr. Guidry claims the lump sum payment tendered in Texas is exempt under Vernon's Tex.Prop. Code tit. 5, § 42.0021(a) (1992), which provides that: "[A] person's right to the assets held in or to receive payments, whether vested or not, under any pension . . . plan . . . is exempt from attachment, execution, and seizure for the satisfaction of debts."

Mr. Guidry has failed to persuade this court that under the stipulations effective in this case Texas law is applicable. We decline, therefore, to construe Texas law or to decide whether the Texas law is preempted by ERISA. In his opening brief he states: "[Mr.] Guidry . . . assert[s] the Texas exemption as to the lump sum of some $191,000.00, which was attempted to be delivered in Texas, and subsequently, deposited in the Registry of the Court in Texas." In his reply brief he further states: "It is definitely appropriate to apply the Texas law, since that is [where] the lump sum was paid, and that is where [Mr.] Guidry resides."

This claim is unpersuasive. Mr. Guidry cites no law in support of his assertion that the Texas statute is applicable. He cites no law explaining how this court should apply a Texas exemption statute to a Colorado writ of garnishment, and he cites no authority with respect to the possible preemption of the Texas statute by ERISA. Moreover, the district court held that the attempted tender of the funds in Texas

was invalid, and in addition, by stipulation of the parties, Mr. Guidry received the funds in an account established by him in Colorado for that purpose. For the foregoing reason we find that all issues with respect to the tender in Texas are moot. On this record, and strictly with respect to the facts of this case, we will not consider the Texas exemption statute.

As a last alternative exemption, Mr. Guidry claims the garnishment of his benefits is prohibited by the Federal Consumer Credit Protection Act, 15 U.S.C.A. §§ 1672 and 1673 (1982).[14] However, as Mr. Guidry merely cites to the

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[14] 15 U.S.C.A. § 1672 provides that:

> (a) The term "earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.
>
> (b) The term "disposable earnings" means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.
>
> (c) The term "garnishment" means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt.

15 U.S.C.A. § 1673(a) provides:

> (a) Except as provided in subsection (b) of this section and in section 1675 of this title, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed
>
> (1) 25 per centum of his disposable earnings for that week, or
>
> (2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 206(a)(1) of Title 29 in effect at the time the earnings

statute and does not address or distinguish contrary law, we decline to reach this issue. We assume, without deciding that this circuit would follow the Ninth Circuit's opinion in *Usery* and decline to extend the anti-garnishment protection of the Federal Consumer Credit Protection Act to earnings that have been received. We withhold judgment on the issue until such case as it is properly briefed.

VII. JUDICIAL ADMISSION

Mr. Guidry contends that Local 9 conceded in oral argument to the Supreme Court that the garnishment proceeding in this case is barred by *Hisquierdo*.[15] Mr.

> are payable, whichever is less. In the case of earnings for any period other than a week, the Secretary of Labor shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2).

[15] The following dialogue is from the official transcript of the oral argument before the Supreme Court. Mr. Goldhammer was counsel for Local 9.

> QUESTION: I take it procedures to execute your judgment, I suppose you can haul him in, haul him into court and ask him – find out what his assets are and things like that?
>
> MR. GOLDHAMMER: Sure.
>
> QUESTION: And can you get an order to pay over to – as soon as he gets the money, can you get an order to have him to pay it over?
>
> MR. GOLDHAMMER: There's a case in this Court called Hisquierdo v. Hisquierdo which said you can't do that. In that case there was an anti-alienation provision –

Guidry cites the doctrine of judicial admissions in support. This argument lacks merit. " 'Judicial admissions are formal admissions . . . which have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact.' " *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir.1988) (quoting *In re Fordson Eng'g Corp.*, 25 B.R. 506, 509 (Bankr. E.D.Mich.1982)). Because the matter Mr. Guidry claims was admitted is a proposition of law, the doctrine of judicial admission is not applicable. Moreover, in the Tenth Circuit briefs are not part of the record, and statements made in briefs may be considered admissions at the court's discretion. *Plastic Container Corp. v. Continental Plastics of Okla., Inc.*, 607 F.2d 885, 906 (10th Cir.1979), *cert. denied*, 444 U.S. 1018, 100 S.Ct. 672, 62 L.Ed.2d 648 (1980). We view oral argument similarly. If the doctrine were applicable, we would decline to view counsel's statement as an admission because it was not sufficiently deliberate to rise to the level of a judicial admission. Likewise, whether characterized as a "judicial admission" or not, it is not the case that Local 9 conceded the issue. In the absence of reliance, we will not bind counsel to a statement made in a prior, albeit related, appeal when the alleged concession related to an issue not presented for review in that case. Accordingly, to the extent Mr. Guidry

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QUESTION: That's just a runaround in the anti-alienation –

MR. GOLDHAMMER: Yes. That makes the anti-alienation provision meaningless. If you want to rule that we can do that, we'd be more than happy to accept that ruling, but you'd have to overrule *Hisquierdo v. Hisquierdo.*

contends Local 9 conceded the issue on this appeal, we disagree.

Mr. Guidry's argument could also be characterized as asserting the doctrine of judicial estoppel. That doctrine, recognized by some circuits, prevents a party from relying on inconsistent arguments in successive stages of litigation when the party was victorious on the point in a prior phase of the case. *See generally United Mine Workers of America 1974 Pension v. Pittston Co.*, 984 F.2d 469, 477 (D.C.Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 3039, 125 L.Ed.2d 726, ___ U.S. ___, 113 S.Ct. 3040, ___ L.Ed.2d ___ (1993). Without deciding whether the doctrine applies in the Tenth Circuit, we note the criteria are not satisfied. *See United States v. 49.01 Acres of Land*, 802 F.2d 387 (10th Cir.1986) (doctrine of judicial estoppel not recognized by Tenth Circuit). Local 9 was not the prevailing party at the Supreme Court, nor is it apparent the Supreme Court adopted the position allegedly conceded by Local 9. As this is the case, the doctrine of judicial estoppel is not applicable. We mention it only to highlight the inapplicability of the judicial admission doctrine.

IX. OTHER MATTERS

Next, we consider the district court's holding that the attempt of the Funds to satisfy the judgment against them by the tender in Texas was ineffective. Local 9 claims the ruling was unnecessary because the parties stipulated the funds were in the account of Mr. Guidry. We agree and vacate this part of the district court's order. Finally, we consider Mr. Guidry's cross-appeal for fees. Because he is not the prevailing party, this issue is moot.

X. CONCLUSION

There is a distinction in the law between benefits in the plan and benefits paid and received by the participant under the plan. *Cf. Usery.* It is unclear from the statute whether Congress intended ERISA § 206(d)(1) to cover benefits paid and received, as in the Social Security Act, 42 U.S.C. § 407(a), or whether it intended the section to apply only to actions enforceable against the plan. Although we are aware garnishment in the present context may thwart Congress' intent, we cannot in the absence of clear evidence to the contrary be certain that is the case, and the applicable ERISA Regulations to which we must defer provide otherwise. We therefore hold, under the facts of this case, that ERISA provides no protection to funds paid to, and received by, the plan participant. The parties have requested this court to instruct the district court as to the shape of relief to be granted pursuant to this appeal. We decline to do so because certain essential factual matters are not in the record.

The decision of the district court is **REVERSED**. The case is remanded to the district court for such other and further proceedings as may be consistent with this opinion.

BROWN, Senior District Judge, dissenting.

The Majority has reversed the district court's disposition of this case after finding that the Supreme Court's opinion in *Guidry v. Sheet Metal Pension Fund,* 493 U.S. 365, 110 S.Ct. 680, 107 L.Ed.2d 782, was not binding authority as "the law of the case." Because I find that the

ruling there required the district court to make the findings that it did, I must respectfully dissent.

While I agree that the *Guidry* case which involved a constructive trust is technically distinguishable, we still must give careful consideration to the meaning and effect the Court gave to Section 206(d) when applying it to the factual situation now before us.

Section 206(d) simply provides that "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." I do not agree with the majority finding that the meaning of such provision is "unclear." It is my opinion that the Supreme Court in *Guidry* has clearly interpreted that section insofar as it applies to Guidry's pension benefits.

It should first be noted that the Supreme Court reviewed the *Guidry* case in order to resolve conflicts among the circuits. See 493 U.S. at 371 n. 9, 110 S.Ct. at 685 n. 9, 107 L.Ed.2d at 791 n. 9. In discussing the prohibition against alienation, the Court persistently equated "garnishment" with the conduct prohibited by ERISA; and I believe that insofar as Guidry's case is concerned his "stream of income" is protected from garnishment.[1]

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[1] Thus, the Court noted that this circuit "appeared to recognize that the anti-alienation provision generally prohibits the garnishment of pension benefits as a means of collecting a judgment." 493 U.S. at 369, 110 S.Ct. at 684, 107 L.Ed.2d at 791. "The view that the statutory restrictions on assignment or alienation of pension benefits apply to garnishment is consistent with applicable administrative regulations. . . . " 493 U.S. at 371-72, 110 S.Ct. at 685, 107 L.Ed.2d at 792.

Given Guidry's criminal conduct, I realize that such a result in [sic] unpalatable; but the Supreme Court is on record clearly stating that the ERISA prohibition on assignment or alienation "reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), *even if that decision prevents others from securing relief for the wrongs done them.*" (Emphasis supplied.) 493 U.S. at 376, 110 S.Ct. at 687, 107 L.Ed.2d at 795. At this point, the Court found that if any exceptions to this policy were to be made, then it was up to Congress to do so as has been done in the case of a "qualified domestic relations order."[2] *Ibid.*, 493 U.S. at 376 n. 18, 110 S.Ct. at 687 n. 18, 107 L.Ed.2d at 795 n. 18. The Court gave us further guidance by warning that courts should not find equitable exceptions to legislative prohibitions:

> "the creation of such exceptions, in our view, would be especially problematic in the context of an *anti-garnishment provision*. Such a provision acts by definition, to hinder the collection of a lawful debt. A restriction on *garnishment* therefore can be defended *only* (emphasis of the court) on the view that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. It makes little sense to adopt such a policy and then to refuse enforcement whenever enforcement appears inequitable."

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[2] In 29 U.S.C. § 1056(d)(3), Congress provided that the anti-alienation provision would not apply to qualified domestic relations orders.

(Except as noted, emphasis supplied.) 493 U.S. at 376-77, 110 S.Ct. at 687, 107 L.Ed.2d 782.

If the majority is correct in its interpretation of Section 206(d), then any state statute which exempts pension benefits covered by ERISA from garnishment, such as those found in Colorado and Texas, would be nullified.[3] I am not persuaded that Congress intended this result.

I recognize that my view of the Supreme Court's findings in *Guidry* would lead to consequences which were not specifically addressed by that court, since all ERISA pension benefits would be protected from garnishment when deposited in the name of the beneficiary, in a separate account and not mingled with other funds. This would place ERISA pensions in the same protected category as *federal* benefits provided through social security, civil service, and veteran's legislation. In my view we need not reach the question of Congress' intent, because the issue of congressional intent is simply not before us. The Supreme Court has spoken on the issue, and I do not believe that we are free to reinterpret the Section 206(d) ban on garnishments as it applies to garnishment of Guidry's pension benefits. I would affirm the decision of the district court, and remand this case for additional findings on the refusal to allow attorney fees.

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[3] As noted by the majority opinion, the Colorado exemption statute is preempted by ERISA § 514(a) since it relates to employee benefit plans covered by ERISA.

Curtis GUIDRY, Plaintiff-Appellee
and Cross-Appellant,

v.

SHEET METAL WORKERS NATIONAL PENSION FUND,
Sheet Metal Workers' Local Unions and Councils Pension Plan, Defendants-Appellees,

Sheet Metal Workers International Association, Local No. 9, Defendant-Intervenor-Appellant and, Cross-Appellee,

Sheet Metal Workers' Local No. 9 Pension Fund, Party Under Rule 19, F.R.C.P., Defendant-Intervenor and Appellee,

Edward J. Carlough; Robert T. Stringer; C.T. Roff; Cavet Snyder; Cecil D. Clay; George J. Cuddihy; Urie E. Williams, Jr.; and Richard J. Scott, Trustees, Defendants.

Josephine Upah, Amicus Curiae.

Nos. 92-1018, 92-1034.

United States Court of Appeals,
Tenth Circuit,

Nov. 1, 1994.

Union official convicted of embezzling union funds brought action against union to recover retirement benefits. The United States District Court for the District of Colorado, Matsch, J., 641 F.Supp. 360, ordered that constructive trust be imposed on benefits in union's favor. The Court of Appeals, 856 F.2d 1457, affirmed. On certiorari, the Supreme Court, 493 U.S. 365, 110 S.Ct. 680, 107 L.Ed.2d 782, reversed and remanded. On remand, 10 F.3d 700, the Court of Appeals reversed. On rehearing en banc,

the Court of appeals, Brorby, Circuit Judge, delivering opinion of court with respect to Part I, and Seymour, Chief Judge, delivering opinion of court with respect to Part II, held that: (1) antialienation provision of ERISA does not bar garnishment of private pension benefits once they are paid to and received by beneficiary; (2) ERISA did not preempt Colorado statute which exempts from garnishment 75% of disposable earnings, including compensation denominated as pension or retirement benefits; and (3) official qualified for Colorado exemption.

Remanded.

Brorby, Circuit Judge, filed opinion dissenting in part in which Stephen H. Anderson and Tacha, Circuit Judges, joined.

Eldon E. Silverman of Elrod, Katz, Preeo, Look, Moison & Silverman, P.C., Denver, CO, for plaintiff-appellee and cross-appellant.

Joseph M. Goldhammer (Ellen M. Kelman with him on the briefs) of Brauer, Buescher, Valentine, Goldhammer & Kelman, P.C., Denver, CO, for Local No. 9.

Amicus Curiae Josephine Upah submitted on brief by Daniel J. Wintz and William Jay Riley, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., Omaha, NE.

Before SEYMOUR, Chief Judge, LOGAN, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, Circuit Judges.

ON REHEARING EN BANC

Upon rehearing this case en banc, we return to the issue of whether the anti-alienation provision of the Employee Retirement Income Security Act of 1974 (ERISA) § 206(d)(1), 28 U.S.C. § 1056(d)(1), prohibits the garnishment of pension benefits after the benefits have been paid to and received by the beneficiary. The district court held that the ERISA provision applies and protects the funds from garnishment so long as they are clearly identified, are not commingled, and have not been used to acquire other assets. The panel opinion reversed, concluding that the ERISA anti-alienation provision does not apply. The panel further held that an exemption from garnishment provided by Colorado Law is preempted by ERISA. On rehearing en banc, we agree with the panel that ERISA's anti-alienation provision is not applicable here. However, we conclude that state law is not preempted, and that the funds fall within the coverage of Colorado's exemption from garnishment. We modify the panel opinion accordingly and remand for further proceedings in light of this opinion.

Circuit Judge BRORBY delivered the unanimous opinion of the court with respect to Part I below.

Chief Judge SEYMOUR delivered the opinion of the court with respect to part II, in which Circuit Judges LOGAN, MOORE, BALDOCK, EBEL, KELLY and HENRY joined.

Circuit Judge BRORBY dissented with respect to parts II-A and II-B, joined by Circuit Judges STEPHEN H. ANDERSON and TACHA.

BRORBY, Circuit Judge, for a unanimous court.

BACKGROUND

Essentially, Mr. Guidry is a judgment debtor of the union intervenor, Local No. 9, in the amount of $275,000 plus interest.[1] The district court ordered union pension plans to pay Mr. Guidry's back and future pension benefits after Local No. 9's unsuccessful attempt to impose a constructive trust on pension benefits held by the funds. Local No. 9 then sought to collect its judgment through garnishment of a bank account established in Denver, Colorado, and through attempted seizure of funds tendered to Mr. Guidry at his home in Texas. Mr. Guidry challenged these efforts in United States District Courts in Colorado and in the Southern District of Texas.

Subsequently, the parties entered into a series of stipulations directing the deposit of past pension payments and future payments into a single bank account in Denver, Colorado. The parties also agreed to remove amounts from the Registry of the United States District Court for the Southern District of Texas and place the funds into the Denver account. All disputed funds, therefore, would be subject to a single writ of a garnishment so as to specifically present the issue before us. The United States District Court for the District of Colorado concluded the anti-alienation provision of ERISA continues to protect pension benefits from garnishment "so long as the proceeds are clearly identified as such and have not

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[1] For a complete background, see *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 641 F.Supp. 360 (D.Colo.1986), *aff'd*, 856 F.2d 1457 (10th Cir.1988), *rev'd*, 493 U.S. 365, 110 S.Ct. 680, 107 L.Ed.2d 782 (1990), *decision after remand*, 10 F.3d 700 (10th Cir.1993).

been co-mingled with other funds or used for the acquisition of assets." *Findings, Conclusions and Order On Post Judgment Issues*, No. 84-M-879 (D.Colo. Jan. 8, 1992), slip op. at 3 ¶ 1. The district court held this conclusion was mandated by the law of the case established by the United States Supreme Court in *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 375-76, 110 S.Ct. 680, 686-87, 107 L.Ed.2d 782 (1990).

On appeal, our three-judge panel reversed the district court, with one judge dissenting. *Guidry II*, 10 F.2d 700, 717 (10th Cir.1993) (Brown J., dissenting). The panel first held the mandate of the Supreme Court did not require a bar on garnishment of received pension payments. The Supreme Court was not factually presented with the issue of post-payment garnishment and therefore did not explicitly bar such garnishment as part of the law of the case. Nor would our decision to allow garnishment of distributed benefits unsettle any implicit resolution within the Court's mandate.[2]

The panel reached, then, the fundamental issue of whether the anti-alienation provision, ERISA § 206(d)(1), barred post-payment garnishment. After a review of the language of the statute, its legislative history and interpretive regulations, and other benefit protection statutes, we concluded the scope of section 206(d)(1) did not extend to protect private pension benefits once paid to and received by the beneficiary. The panel also held Mr. Guidry was not entitled to protection through state law

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[2] We find no reason to further clarify or disturb the panel's analysis of the law of case. *See Guidry II*, 10 F.3d at 705-08, for the full discussion.

exemptions from garnishment. Mr. Guidry then petitioned for rehearing with a suggestion for rehearing en banc, under Fed.R.App.P. 35 and 40, which we granted.[3]

I.

Having reheard the arguments of the parties and reexamined the panel's opinion, we affirm the primary holding of *Guidry II*. Although the plain language of the anti-alienation provision of ERISA and its legislative history are inconclusive, the applicable administrative regulations show the provision was not intended to apply to benefits following distribution to and receipt by the beneficiary. This interpretation is also consistent with comparison of other statutory provisions that expressly provide greater protection to retirement income.

ERISA is a comprehensive statute intended in significant part to ensure pension benefits will actually be received upon retirement by plan participants and beneficiaries. *See Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361, 374-75, 100 S.Ct. 1723, 1726, 1732-33, 64 L.Ed.2d 354 (1980). To that end, ERISA imposes "minimum standards" on private plan managers and employers. ERISA § 101(a), 29 U.S.C. § 1001(a). The anti-alienation provision of ERISA states, as a required standard for the form and payment of benefits, "[e]ach pension plan shall provide that benefits provided under

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[3] Of the seven questions Mr. Guidry poses for rehearing, he does not question the panel's discussion of judicial admission and judicial estoppel. After a review of the panel opinion, we do not disturb its conclusions. *See Guidry II*, 10 F.3d at 715-16, for this discussion.

the plan may not be assigned or alienated." ERISA § 206(d)(1), 28 U.S.C. § 1056(d)(1).[4] The provision focuses on benefits, *see Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 836, 108 S.Ct. 2182, 2189, 100 L.Ed.2d 836 (1988), but is silent on whether the term is meant to include benefits in the nature of distributed funds no longer within the fund and held by the plan participant or beneficiary. We therefore look to traditional aids in constructing the statute. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13, 101 S.Ct. 2615, 2622-23, 69 L.Ed.2d 435 (1981).

Legislative history of section 206(d)(1) has been described as sparse and inconclusive. *See Coar v. Kazimir*, 990 F.2d 1413, 1420 (3d Cir.) (citing *Ellis Nat'l Bank v. Irving Trust Co.*, 786 F.2d 466, 470 (2d Cir.1986); *GMC v. Buha*, 623 F.2d 455, 460 (6th Cir.1980)), *cert. denied*, ___ U.S. ___,114 S.Ct. 179, 126 L.Ed.2d 138 (1993). A House Report explains the anti-alienation provision was designed "[t]o further ensure that the employee's accured [sic] benefits are actually available for retirement purposes." H.R.Rep.No. 807, 93d Cong., 2d Sess. (1974),

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[4] This standard is met, for example, in the trust documents of the Sheet Metal Workers' National Pension Fund:

> No monies, property or equity, of any nature whatsoever in the Fund or policies or benefits or monies payable therefrom, shall be subject in any manner by an Employee or person claiming through such Employee to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, garnishment, mortgage, lien or charge, and any attempt to cause the same subject thereto shall be null and void.

(Apt.App. to Answer and Reply, at 39.)

reprinted in 1974 U.S.C.C.A.N. pp. 4639, 4670, 4734.[5] This history indicates a plan is obligated to protect benefits from alienation at least up to point of payment so that benefits will be available for retirement purposes. Again, however, legislative history does not resolve whether ERISA protection extends past the mere availability of funds within the plan to include funds held by the beneficiary after distribution.

In the absence of clear Congressional intent, we give deference to reasonable agency regulations.[6] *See Udall v. Tallman*, 380 U.S. 1, 16, 84 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965). Treasury regulations define "assignment" and "alienation" as "[a]ny direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary *a right or interest enforceable against the plan* in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary." 26 C.F.R. § 1.401(a)-13(c)(1)(ii) (1992) (emphasis added). While the

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[5] The remaining legislative history also explains the limited ten percent exemption to the alienation restriction found in § 206(d)(2), 29 U.S.C. § 1056(d)(2). "[A] plan will be permitted to provide for voluntary and revocable assignments (not to exceed 10 percent of any benefit payment)." H.R.Rep. No. 807, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4734. Section 206(d)(2) does not apply to present case as "a garnishment or levy is not to be considered a voluntary assignment." H.R.Rep. No. 1280, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5061.

[6] The panel opinion painstakingly concluded the Department of Treasury is within its authority to issue this ERISA regulation, 10 F.3d at 708-09, and the regulation is reasonable, 10 F.3d at 710-11. We need not reopen those issues.

regulation does not define "benefits," it resolves our issue from another direction. The terms "alienation" and "assignment" are meant only to cover those arrangements that generate a *right enforceable against a plan.* Therefore, "benefits" are protected by the anti-alienation provision of section 206(d)(1) only so long as they are within the fiduciary responsibility of private plan managers. Following distribution of benefits to the plan participant or beneficiary, a creditor no longer has a right *against the plan.* Instead, the creditor must collect directly from the participant or beneficiary or, as here, initiate an enforceable garnishment procedure against a third-party bank who holds the funds paid to the participant or beneficiary.

This limited reading of ERISA section 206(d)(1) makes sense when compared with the more specific language found in other income protection statutes. For example, the Social Security Act, 42 U.S.C. § 407(A), prohibits the attachment or garnishment of the right to future benefit payments as well as "the moneys paid or payable" to a beneficiary. *See Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973) (social security funds on deposit retain § 407 protection as "moneys paid"). The Veterans' Benefits Act, 38 U.S.C. § 5301(a), makes payments of benefits "made to, or on account of, a beneficiary . . . exempt from the claim of creditors, and shall not be liable to attachment . . . either before or after receipt by the beneficiary." *See Porter v. Aetna Casualty & Sur. Co.*, 370 U.S. 159, 82 S.Ct. 1231, 8 L.Ed.2d 407 (1962) (veterans' benefits paid into savings and loan account remain readily withdrawable and therefore retain protection). Congress knew how to draft a

statute protecting benefits that had left the pension plan, and it did not use similar language with ERISA section 206(d)(1).

We therefore affirm the primary holding of the *Guidry II* panel and conclude ERISA section 206(d)(1) protects ERISA-qualified pension benefits from garnishment only until paid to and received by plan participants or beneficiaries. *Accord Trucking Employees of N. Jersey Welfare Fund, Inc. v. Colville,* 16 F.3d 52 (3d Cir.1994) (agreeing with the holding of *Guidry II* panel opinion); *NCNB Fin. Servs., Inc. v. Shumate,* 829 F.Supp. 178 (W.D.Va.1993) (once the line of actual receipt is crossed, ERISA no longer protects funds originating in private pension plan, although funds originating from social security would be protected under the Social Security Act).

SEYMOUR, Circuit Judge, joined by LOGAN, MOORE, BALDOCK, EBEL, PAUL KELLY, Jr., and HENRY, Circuit Judges.

II.

In the alternative , Mr. Guidry claims exemptions from garnishment under Colorado and Texas law.[7] *See* Colo.Rev.Stat. §§ 13-54-104, 13-54-102; Tex.Prop.Code.tit. 5 § 42.0021. The panel opinion held that relevant state law

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[7] Mr. Guidry originally claimed an exemption under the federal Consumer Credit Protection Act but did not ask the en banc court to reconsider our panel's rejection of this exemption his list of questions for rehearing. After a review of the panel opinion, we do not disturb its conclusion. *Guidry II,* 10 F.3d at 715.

is either inapplicable or preempted by ERISA. *See* 10 F.3d at 713-14. However, the analysis which supports our determination that ERISA's anti-alienation provision does not apply here impels us to hold, contrary to the panel opinion, that ERISA's preemption provision is equally inapplicable. The conclusion that state law is not preempted is also mandated by the legal standards under which this and other courts have evaluated ERISA preemption. On the merits, applicable Colorado law clearly provides that the funds at issue here are within the ambit of that state's exemption from garnishment. We therefore hold that the funds are exempt from garnishment to the extent provided by Colorado law.

A.

The ERISA preemption provision applies to state laws that "relate to any employee benefit plan" covered by the Act. 29 U.S.C. § 1144(a) (1988). "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96-97, 103 S.Ct. 2870, 2899-900, 77 L.Ed.2d 490 (1983). A state law may "relate to" a benefit plan "even if the law is not specifically designed to affect such plans, or the effect is only indirect." *District of Columbia v. Greater Washington Bd. of Trade*, ___ U.S. ___, ___, 113 S.Ct. 580, 583, 121 L.Ed.2d 513 (1992) (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139, 111 S.Ct. 478, 483, 112 L.Ed.2d 474 (1990)). Although "the words 'relate to' should be construed expansively," *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 8, 107 S.Ct. 2211, 2215-16, 96 L.Ed.2d 1 (1987), the scope of ERISA preemption is not unlimited, *see Ingersoll-*

Rand Co. v. McClendon, 498 U.S. 133, 139, 111 S.Ct. 478, 483, 112 L.Ed.2d 474 (1990). State law will not be preempted when it has only "a 'tenuous, remote, or peripheral' connection with covered plans, as is the case with many laws of general applicability." *Greater Washington Bd. of Trade*, ___ U.S. at ___ n. 1, 113 S.Ct. at 583 n. 1 (quoting *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100 n. 21, 103 S.Ct. 2890, 2901 n. 21, 77 L.Ed.2d 490 (1983)).

ERISA preemption principles are easier to state than they are to apply. *See, e.g., Monarch Cement Co. v. Lone Star Indus., Inc.*, 982 F.2d 1448, 1452 (10th Cir.1992) (pointing out difficulty in determining when state law preempted); *National Elevator Indus., Inc. v. Calhoon*, 957 F.2d 1555, 1558-59 (10th Cir.) (same), *cert. denied*, ___ U.S. ___, 113 S.Ct. 406, 121 L.Ed.2d 331 (1992); *Arkansas Blue Cross & Blue Shield v. St. Mary's Hosp.*, 947 F.2d 1341, 1344 (8th Cir.) (same), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2305, 119 L.Ed.2d 227 (1992); *Aetna Life Ins. Co. v. Borges*, 869 F.2d 142, 145 (2d Cir.) (same), *cert. denied*, 493 U.S. 811, 110 S.Ct. 57, 107 L.Ed.2d 25 (1989). "[T]he 'ultimate touchstone' in determining preemption is the Congressional purpose in enacting ERISA." *Hospice of Metro Denver v. Group Health Ins.*, 944 F.2d 752, 755 (10th Cir.1991) (quoting *Fort Halifax packing*, 482 U.S. at 8, 107 S.Ct. at 2216).

> The purpose of ERISA preemption is twofold. First, preemption "protect[s] the interest of employees and their beneficiaries in employee benefit plans." Second, preemption "ensure[s] that plans and plan sponsors are subject to a uniform body of benefit law . . . [by] minimiz[ing] the administrative and financial burden of complying with conflicting directives

> among States or between States and the Federal Government."

Monarch Cement, 982 F.2d at 1453 (citations omitted).

We turn first to Mr. Guidry's claims under Colorado law. Local No. 9 filed several writs of garnishment in Colorado federal district court beginning in late April 1991. Mr. Guidry initially claimed that seventy-five percent of the funds were exempt under Colorado law, relying on Colo.Rev.Stat. § 13-54-104(2)(a) (1987). Mr. Guidry further claimed, by stipulation with Local No. 9, that the funds were completely exempt under Colo.Rev.Stat. § 13-54-102(a)(s) (Supp.1993), as amended in 1991.[8] Aplt.App. at 51. The statute providing a total exemption, however, applies only to writs issued by a court in any action brought on or after the effective date of its amendment, May 1, 1991. *See* 1991 Colo.Sess.Laws 385, § 7; Colo.R.Civ.P. 103 §§ 1 & 3, Committee Comment

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[8] Effective May 1, 1991, mention of pension and retirement plans was deleted in the definition of "earnings" in § 13-54-104(1)(b). *See* 1991 Colo.Sess.Laws 384 § 3 (codified at Colo.Rev.Stat. § 13-54-104(1)(b)(1) (Supp.1993)). Colo.Rev.Stat. § 13-54-102(1) (1987) which previously made no mention of pension plans, was amended in May, 1991 to provide a one hundred percent exemption for "property,"

> including funds, held in or payable from one pension or retirement plan or deferred compensation plan, . . . including pension of plans which qualify under the federal "Employee Retirement Income Security Act of 1974" as an employee pension benefit plan, as defined in 19 U.S.C. sec. 1002. . . .

1991 Colo.Sess.Laws 383, § 1 (codified at Colo.Rev.Stat. § 13-54-102(1)(s) (Supp. 1993)).

(Supp.1993) ("The amendment impacts the ability to garnish certain forms of income, depending upon when the original action was commenced"). Because the action underlying the writs was brought before the effective date of the amendments, we address only Mr. Guidry's claim of exemption under Colo.Rev.Stat. § 13-54-104(2)(a), which exempts seventy-five percent of "disposable earnings" from garnishment. The pertinent statute defined "earnings" to include "compensation paid or payable for personal services, whether denominated as . . . *avails of any pensions or retirement benefits,* or deferred compensation plan . . . or otherwise." Colo.Rev.Stat. § 13-54-104(1)(b) (1987) (emphasis added) (amended 1991).

When the Colorado garnishment exemption at issue here is evaluated in light of the principles governing ERISA preemption, the Colorado statute clearly does not have a connection with or contain a reference to the covered plan under any of the analyses applied by various courts. Several circuits have recognized common categories of laws that have a connection to ERISA plans, all of which either create or regulate plan benefits, terms, reporting or other requirements, or provide remedies for misconduct arising from plan administration. *See National Elevator,* 957 F.2d at 1558-59 (quoting *Martori Bros. Distrib. v. James-Messengale,* 781 F.2d 1349 (9th Cir.), *cert. denied,* 479 U.S. 1018, 107 S.Ct. 670, 93 L.Ed.2d 722 (1986)); *see also Arkansas Blue Cross,* 947 F.2d at 1344-45; *Aetna Life Ins. Co.,* 869 F.2d at 146-47. These state laws are preempted because they run afoul of Congressional intent that ERISA plans not be subject to conflicting state directives. Laws which regulate or affect the relationships among the

primary ERISA entities are preempted for the same reason. *See, e.g., Credit Managers Ass'n v. Kennesaw Life & Accident Ins.*, 25 F.3d 743, 751 (9th Cir.1994); *Arkansas Blue Cross*, 947 F.2d at 1344; *Memorial Hosp. Syst. v. Northbrook Life Ins. Co.*, 904 F.2d at 236, 248-49 (5th Cir.1990). The Colorado garnishment exemption does not affect the calculation or payment of plan benefits, nor does it otherwise impact the administration of the plan or the relationship among the plan entities. Indeed, the Colorado law has no impact on the plan whatsoever, either direct or indirect.

The state statute is therefore preempted only if it is read as making reference to an ERISA plan. "[S]tate laws which make 'reference to' ERISA plans are laws that 'relate to' those plans within the meaning of [the ERISA preemption provision]." *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825, 829, 108 S.Ct. 2182, 2185, 100 L.Ed.2d 836 (1988). The relevant Colorado statute exempts from garnishment a percentage of an individual's earnings, which the statute defines as "*compensation paid* or payable for personal services, *whether denominated as* wages, salary, commission, bonus, *avails of any pension or retirement benefits*, or deferred compensation plan, avails of health, accident, or disability insurance, or otherwise." Colo.Rev.Stat. § 13-54-104(1)(b) (1987) (emphasis added). Although the emphasized portion quoted above does refer generally to pension *benefits*, it does not refer to ERISA benefits specifically nor does it refer to ERISA *plans*. These factors are significant.

As the Supreme Court has pointed out, "ERISA's preemption provision does not refer to state laws relating to 'employee benefits,' but to state laws relation to

'employee benefit *plans*.' " *Fort Halifax Packing*, 482 U.S. at 7, 107 S.Ct. at 2215; *see also Ingersoll-Rand*, 498 U.S. at 139, 111 S.Ct. at 483. Because the Colorado law here refers to benefits rather than plans, "the language of the ERISA presents a formidable obstacle to [preemption]." *Fort Halifax Packing*, 482 U.S. at 8, 107 S.Ct. at 2216; *see Standard Ins. Co. v. Saklad*, 119 Or.App. 91, 849 P.2d 1150, 1152 (1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1236, 127 L.Ed.2d 580 (1994).

The Supreme Court's analysis of the Georgia garnishment statutes at issue in *Mackey* compels the conclusion that the Colorado garnishment exemption is not preempted. One state statute in *Mackey* expressly referred to and applied solely to ERISA benefit plans. *See Mackey*, 486 U.S. at 829, 108 S.Ct. at 2185. The Court held that this statute was preempted because it "single[d] out ERISA employee welfare benefit plans for different treatment under state garnishment procedures." *Id.* at 830, 108 S.Ct. at 2186. "It is this 'singling out' that pre-empts the Georgia antigarnishment exception." *Id.* at 838, 108 S.Ct. at 2190 n. 12. In contrast, the general Georgia garnishment statute in *Mackey* did "not single out or specifically mention ERISA plans of any kind." *Id.* at 831, 108 S.Ct. at 2186. The Court examined whether the general statute was nonetheless preempted because it related to ERISA, and concluded that it was not. Critical to this result was the Court's conclusion that, as a matter of Congressional intent, "state-law methods for collecting money judgments must, as a general matter, remain undisturbed by ERISA." *Id.* at 834, 108 S.Ct. at 2187-88.

Unlike the statute held preempted in *Mackey*, the Colorado statute before us does not specifically mention

ERISA plans or single them out for special treatment. Although the Colorado law does make a generic reference to pension benefits, the law is nonetheless one of general application and therefore of the type that has consistently been described as outside the reach of ERISA's preemption provision. *See, e.g., Greater Washington Bd. of Trade*, ___ U.S. at ___ n. 1, 113 S.Ct. at 583 n. 1; *Monarch Cement*, 982 F.2d at 1452; *Aetna Life Ins.*, 869 F.2d at 146. Such statutes may nonetheless be preempted if they have a connection to ERISA plans. *See, e.g., Arkansas Blue Cross*, 947 F.2d at 1344-51. For the reasons discussed above, however, the Colorado garnishment exemption has absolutely no impact on ERISA plans when examined in light of the factors relevant to such a determination. *Accord Standard Ins.*, 849 P.2d at 1152.

Finally, a finding that ERISA does not preempt state law here is mandated by logic and common sense. If, as we hold, the anti-alienation provision of ERISA does not apply to the funds at issue because they are no longer associated with an ERISA plan, it follows that a state law affecting those funds likewise does not relate to an ERISA plan. The Colorado law providing an exemption to garnishment is therefore not preempted by ERISA. *Accord id.*

B.

Turning to the application of the Colorado provisions, the discussion and decision in *Rutter v. Shumway*, 16 Colo. 95, 26 P. 321 (1891), drives our conclusion that these funds are exempt from garnishment. In *Rutter*, the Colorado Supreme Court held that the then-applicable

garnishment exemption[9] continued to apply to wages after they had been deposited in the wage earner's bank account.[10] The court emphasized that the Colorado Constitution mandates the enactment of liberal exemption laws. *See* Colo. Const. art. XVIII, § 1. In response to the argument that wages should only be exempt while they remain in the hands of the employer, the court pointed out that "[t]he statute contains no such limitation or condition." *Id.* at 322. In keeping with its conclusion that exemptions must be construed liberally, the Colorado court assumed that absent specific language in the statute limiting the extent of the exemption, the legislature did not intend to impose a limitation.

The rationale expressed by the court in *Rutter* in extending the garnishment exemption to wages deposited in a bank account is directly relevant here:

> *It is argued with much ingenuity that the earnings of the laborer, when received by him, are no longer wages, but capital; that the exemption statute has performed its office when it has enabled the laborer to*

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[9] The relevant exemption provision stated:
"There shall be exempt from levy under execution or attachment or garnishment *the wages and earnings* of any debtor to an amount not exceeding one hundred dollars, earned during the thirty days next preceding such levy,"
. . . .
Rutter, 26 P. at 322 (quoting Act of March 28, 1885, Sess.Laws p. 262) (emphasis added).

[10] Although the wages at issue in *Rutter* may have been comingled, we limit our holding in this case to the facts before us, which establish that the funds here were not comingled and retained their identity as pension benefits.

> *secure his wages from his employer* without let or hindrance; and that thereafter the statute cannot be invoked in his favor. The statute cannot be thus reasoned away. *Such a construction is narrow and illiberal. It would compel the laborer to leave his earnings in the hands of his employer, or else forego the protection of the statute altogether.* It would not only deprive him of the privilege of depositing his earnings with any bank or other depository for safekeeping, but would subject his wages to supplemental proceedings even in his own pocket; for, if earnings once received immediately lose their character as wages, then it is evident that *the laborer could never retain his earnings for a single hour without exposing them to the very perils which the statute was designed to avert. Such a construction would practically frustrate the beneficent objects of the statute.*

26 P. at 322 (emphasis added). While *Rutter* is admittedly old, it has never been overruled by the Colorado Supreme Court and was recently followed in *In re Kobernusz*, 160 B.R. 844, 847-48 (D.Colo.1993). *See also Miller v. Monrean*, 507 P.2d 771, 774-75 (Alaska 1973) (quoting *Rutter* with approval). We likewise are required to follow it.

Moreover, we note that the "compensation paid" language in the Colorado statute is virtually identical to the language in the Social Security Act, 42 U.S.C. § 407(a) (1988), which prohibits the garnishment of "the moneys paid or payable" to a beneficiary. The Supreme Court specifically held in *Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973), that this language in the Social Security Act exempts funds after they have been deposited into the recipient's bank account. The Court said:

> The protection afforded by § 407 is to "moneys paid" and we think the analogy to veterans' benefits exemptions which we reviewed in *Porter v. Aetna Casualty and Surety Co.*, 370 U.S. 159 [82 S.Ct. 1231, 8 L.Ed.2d 407 (1962)], is relevant here. We held in that case that veterans' benefits deposited in a savings and loan association on behalf of a veteran retained the "quality of moneys" and had not become a permanent investment. *Id.*, at 161-162 [82 S.Ct. at 1232-33].

Id. 409 U.S. at 416, 93 S.Ct. at 592 (citations omitted). We hold that pension benefits which constitute "compensation paid" under the Colorado statute retain their exempt status just like "moneys paid" under the Social Security Act do. Mr. Guidry is therefore entitled to an exemption from garnishment of the uncommingled pension benefits held by him in his bank account.

C.

In his petition for rehearing, Mr. Guidry also challenges the panel's resolution of his claims concerning the applicability of the Texas blanket pension exemption under the Texas anti-garnishment law. To the extent Mr. Guidry is claiming that the Texas statute applies to the attempted seizure of the funds *in Texas*, the claim is moot. Having stipulated that all issues concerning the attempted seizure of funds in Texas were rendered moot when the funds were transferred to Colorado, Mr. Guidry effectively stipulated the mootness of his claim that the Texas statute applies to this seizure.

To the extent that Mr. Guidry is arguing that the Texas statute nevertheless applies to funds *after* their

transfer to Colorado, his claim is without any legal support. Mr. Guidry has cited no law to indicate that a Texas exemption would apply to a Colorado garnishment proceeding. In fact, the law is to the contrary. *See Garrett v. Garrett*, 490 P.2d 313, 315 (Colo.App.1971) ("Colorado follows the general rule that exemption laws have no extraterritorial effect.").

In summary, we REMAND this action for further proceedings in light of this opinion with respect to the Colorado statute governing exemption from garnishment.[11]

BRORBY, Circuit Judge, joined by STEPHEN H. ANDERSON and TACHA, Circuit Judges, dissenting.

> The rain it raineth on the just
> And also on the unjust fella:
> But chiefly on the just, because
> The unjust steals the just's umbrella.

Charles Bowen, Thad Stem Jr., and Alan Butler, *Sam Ervin's Best Short Stories* (1973).

---

[11] In his original appeal, Mr. Guidry claimed that the district court abused its discretion in denying his request for attorneys fees. On rehearing, Mr. Guidry made specific arguments and also requested a rehearing on all other issues within the panel opinion, although he did not specifically reassert his earlier argument on the fee issue. Assuming that the issue is properly before the en banc court, we find no grounds for reversing the district court's ruling that Mr. Guidry was not entitled to a fee award under the ERISA fee-shifting provision, 29 U.S.C. § 1132(g). *See Downie v. Independent Drivers Ass'n Pension Plan*, 945 F.2d 1171, 1172 (10th Cir.1991) (district court decision on a fee award under section 1132(g) reviewed for abuse of discretion).

The majority today has ruled that a thief is free to keep the fruits of his crime under Colorado law. If the majority is correct, Colorado shines as a welcome beacon to all embezzlers proclaiming: Embezzle from your employer and keep your pension because Colorado law prohibits recovery. I do not read Colorado law as mandating this bizarre result; therefore, I respectfully dissent from this en banc decision on the matter of Mr. Guidry's claimed exemption from garnishment under Colorado law.

Colorado exempts seventy-five percent of certain types of "earnings" from garnishment. C.R.S. § 13-54-104(2)(a). Prior to the 1991 amendments, the definition of "earnings" included "compensation paid or payable for personal services, whether denominated as . . . *avails of any pension or retirement benefits*, or deferred compensation plan . . . or otherwise." C.R.S. § 13-54-104(1)(b) (emphasis added). At issue is whether the term "avails" was meant to include protection for benefits distributed and received by the participant or beneficiary.

As with any question of statutory interpretation, we begin with the language of the statute. The noun "avails" is defined as a "profit, benefit, value . . . or proceeds." *Webster's Third New Int'l Dictionary* 150 (1981). In *Black's Law Dictionary* (6th ed. 1990), "profits" are defined as "the gross proceeds of a business transaction less the costs of the transaction; *i.e.* net proceeds." *Id.* at 1211. The definition of "proceeds" includes "[i]ssues; income; yield; receipts; produce; money or articles or other thing of value arising or obtained by the sale of property; the sum, amount, or value of property sold or converted into money or into other property. . . . The funds received

from disposition of assets or from the issue of securities (after deduction of all costs and fees)." *Id.* at 1204.

The "avails" of pension benefits clearly contemplates the transition of funds from the plan to the participant or beneficiary. "Avails" includes a yield from the plan, received from its disposition of assets, following administrative costs and fees. Colorado law protects, then, not only funds within the plan but also the process of payment of the funds to the participant or beneficiary. Still, however, the plain language of § 13-54-104(1)(b) does not define the status of funds *once received*. Here the funds have safely arrived into Mr. Guidry's bank account. At oral argument, counsel for Mr. Guidry argued that so long as funds remain traceable as pension plan benefits they remain exempt. *See Rutter v. Shumway*, 16 Colo. 95, 26 P. 321 (1891) (wages placed in bank account do not lose their exempt status as earnings). I disagree.[1]

---

[1] The majority contends we are bound by *Rutter*, 26 P. 321. In *Rutter*, the Colorado Supreme Court, over one hundred years ago, ruled the garnishment exemption continues to apply to wages after they have been deposited into the wage earner's bank account. *Id.* at 322. *Rutter* is still good law in Colorado.

Without attempting any comment on the scope of the garnishment exemption upon wages, *Rutter* does not change the interpretation of the scope of pension fund protection. The *Rutter* court did not specifically comment on the legislature's intent to protect pension benefits as it would protect wages, assuming pension benefits were exempt from garnishment in 1891. To the contrary, the recent amendments to the garnishment scheme show the Colorado legislature is content to treat pension benefits as a completely separate category from wages. *See* 1991 Colo.Sess.Laws 383 §§ 1, 3. Because I would not grant Mr. Guidry's state law exemption, I will not address the deeper questions of federal preemption.

The term "avails" can be extended only so far. During distribution, the pension plan hands payment to the participant or beneficiary. Once payment is received or directed to a bank, the pension plan lets go. Absent that clasp, that transaction, the term "avails" loses meaning. The term "avails" is further restricted by the entire definition of "earnings" under Colorado law. Avails of a plan only include "compensation paid or payable." C.R.S. § 13-54-104(1)(b). Once "paid," a pension benefit loses its protected status. I find no indication that Colorado intended pension benefits, whose status as assets have shifted to nonexempt bank accounts, equities, or bonds, should remain exempt from garnishment, regardless of their ability to be traced.

This interpretation is supported by a comparison with other Colorado pension protection statutes. Acts providing pensions to state police and firemen state "no part of [the] fund, *either before or after any order for the distribution thereof to the members or beneficiaries of such fund* . . . shall be held, seized, taken, subjected to, detained, or levied on by virtue of any attachment," except for child support purposes. C.R.S. §§ 31-30-313(1) and 31-30-412(1) (1986 Repl.Vol. & Supp.1993) (emphasis added). Colorado knew how to provide continuous protection of pension funds following an order of benefits distribution and did not use similar language with the general earnings exemption. I therefore conclude Mr. Guidry's funds, upon receipt by the Denver bank, lost their exempt status under § 13-54-104(1)(b).

The majority has concluded a faithless servant, an embezzler, a man who steals from the hard earned labors of the workers, is entitled to keep the fruits of his crime. I

do not believe the Colorado legislature or the Colorado courts would permit such an unconscionable result. It is nonsensical to assume Colorado would want a thief to keep ill-gotten gains. Like Mr. Bumble of *Oliver Twist*,[2] I believe "[i]f the law supposes that, . . . the law is a ass – a idiot," and I am not willing to believe Colorado law to be either.

The majority has used impeccable logic and marvelous analysis to conclude Colorado law mandates an unjust result. I cannot read Colorado law in such a fashion.

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[2] *Oliver Twist*, Charles Dickens 520 (Dodd, Mead & Co. 1941) (1838).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-M-879

CURTIS GUIDRY,

Plaintiff,

v.

SHEET METAL WORKERS' NATIONAL PENSION FUND, et al.,

Defendants,

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL NO. 9,

Intervenor,

and

SHEET METAL WORKERS LOCAL NO. 9 PENSION FUND,

Party Under Rule 19 F.R.C.P.

FINDINGS, CONCLUSIONS AND ORDER ON POST JUDGMENT ISSUES

(Filed Jan. 8, 1992)

The questions to be decided arise from the following papers in this civil action:

Order for Entry of Judgment, dated February 28, 1991

Judgment, dated February 28, 1991

Recommendation of United States Magistrate Judge Richard M. Borchers, dated May 15, 1991

Intervenor's Written Objections to May 15, 1991 Recommendations of United States Magistrate, filed May 23, 1991

Response of Plaintiff Curtis Guidry to Written Objections to May 15, 1991, Recommendations of United States Magistrate, filed June 6, 1991

Plaintiff's Supplemental Memorandum, filed June 6, 1991

Intervenor's Reply to Plaintiff's Response to Written Objections, filed June 14, 1991

Recommendation of United States Magistrate Judge Richard M. Borchers, filed June 20, 1991

Supplement to Reply to Plaintiff's Response to Written Objections and Supplement to Response to Plaintiff's Supplemental Memorandum, filed by Intervenor on June 27, 1991

Intervenor Union's Objections to the June 20, 1991 Recommendation of United States Magistrate Judge, filed June 28, 1991

Pension Funds' Objections to June 20, 1991 Recommendation of United States Magistrate Judge, filed June 28, 1991

Plaintiff's Motions for Award of Attorney's Fees to Plaintiff Curtis Guidry, filed July 10, 1991

Stipulation Regarding Writ of Garnishment with Notice of Exemption and Pending Levy Served on First Interstate Bank of Denver, May 1, 1991 and for each subsequent month until the final order is entered, filed July 12, 1991

Intervenor's Reply to Plaintiff's Motion for Attorney's Fees, filed August 21, 1991

Stipulation for Deposit of Funds, filed August 23, 1991

Arguments at hearing of August 26, 1991

Reply to Case Citations of Plaintiff at August 26 Hearing and the Question Raised by the Court, filed by Intervenor on September 16, 1991

Supplemental Stipulation for Deposit of Funds, filed November 13, 1991

The judgment of February 28, 1991 gave the plaintiff two types of relief. First, recovery from the pension funds of the amounts past due and unpaid as plan benefits to which he was entitled up to the date of judgment and, second, an order for payment of future monthly pension amounts beginning March 1, 1991.

Curtis Guidry has been the judgment debtor on a judgment in favor of the Union intervenor, Local No. 9, in the amount of $275,000 plus interest. The Union has made efforts to collect his judgment through garnishments on a bank account established by Guidry at the First Interstate Bank of Denver, Denver, Colorado, and through seizure of funds which were tendered to Guidry in Texas by the Pension Funds in an effort to satisfy the judgment for the past due benefits. It is these efforts which gave rise to the post judgment proceedings in this court and in a collateral action in the United States District Court for the Southern District of Texas, Northern Division, which was transferred to this court and bears docket no. 91-X-181.

The supplemental stipulation for deposit of funds on November 13, 1991, has resolved the manner in which the $196,109.18, which had been seized in Texas, would be deposited into bank accounts in Denver, identified as

Curtis Guidry Pension Fund accounts. There are no factual disputes between the parties and the court now makes the following conclusions of law.

1. The ERISA exemption from garnishment, 29 U.S.C. § 1056(d)(1), is applicable to the checks payable to the plaintiff from the Funds and to the stream of income received through the proceeds of those checks so long as the proceeds are clearly identified as such and have not been co-mingled with other funds or used for the acquisition of assets. Thus, the payments into the Curtis Guidry account at the First Interstate Bank of Denver, which account was the subject of the garnishments discussed in Magistrate Judge Borchers' recommendation of May 15, 1991, were exempt from garnishment. This court expressly rejects the reasoning of the Indiana Court of Appeals in *Brosamer v. Mark,* 540 N.E. 2d 652 (Ind.App. 1989) and holds that this conclusion as to the scope of the exemption is mandated by the law of this case in *Guidry v. Sheet Metal Workers' National Pension Fund,* 493 U.S. 365 (1990).

2. The attempt of the Funds to satisfy the judgment against them by the tender made in Texas, discussed in Magistrate Judge Borchers' recommendation of June 20, 1991, was not a legally effective tender of payment of the judgment and is a nullity.

3. The Funds and the Union have not violated any order of this court and have not acted in contempt of the court.

4. Neither the Texas exemption statute nor the Colorado exemption statute are applicable in this case because the exemption of the stream of income recognized here is

that provided by ERISA, as interpreted by the United States Supreme Court, in its opinion which established the law of this case.

5. The plaintiff's motion for attorney's fees is denied. That claim is made under ERISA, 29 U.S.C. § 1132(g). This civil action was initiated as an action to recover plan benefits. The post judgment dispute, however, involves both the plaintiff's claim of exemption under ERISA and the Union's efforts to collect on its judgment, obtained by its complaint in intervention under the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411, *et seq.* The attempt to tender the satisfaction of judgment and seize the funds in Texas does not constitute forum shopping and is not misconduct by the parties or by counsel. What has been shown in this record are diligent efforts by the defendants and Intervenor to avoid an apparent injustice resulting from the Supreme Court's preference for the social policy of protecting plan benefits under ERISA over the traditional equitable powers of the courts to providing a remedy for those injured by criminal conduct. Those efforts have now been ruled invalid. Nonetheless, this court will not add to the inequity by awarding attorney's fees.

Upon the foregoing, it is

ORDERED that the fund proceeds now on deposit in First Interstate Bank of Denver, N.A. Account No. 87-31465, Bank Western Federal Savings Bank Account No. 976-005555-5, and Commercial Federal Savings & Loan, Account No. 6015202-9, pursuant to the November 11, 1991 stipulation are released to the plaintiff to be

withdrawn by the authorized signatories on those accounts, and it is

FURTHER ORDERED that the plaintiff's motion for attorney's fees is denied, and it is

FURTHER ORDERED that collateral proceeding no. 91-X-181 is dismissed as moot.

Dated: *January 8, 1992*

BY THE COURT:
/s/ Richard P. Matsch
Richard P. Matsch, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-M-879

CURTIS GUIDRY,

Plaintiff,

vs.

SHEET METAL WORKERS' NATIONAL PENSION FUND, et al.,

Defendants,

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL NO. 9,

Intervenor,

and

SHEET METAL WORKERS' LOCAL NO. 9 PENSION FUND,

Party Under Rule 19 F.R.C.P.

STIPULATION

---

1. On February 13, 1991, the attorney for Curtis Guidry, Eldon E. Silverman, sent Raymond J. Sweeney, the attorney for the Pension Funds, a February 13, 1991 letter, a true and correct copy of which is attached as Exhibit A. (Exhibit omitted)

2. On February 20, 1991, Mr. Sweeney sent Mr. Silverman a reply letter, a true and correct copy of which is attached as Exhibit B. (Exhibit omitted)

3. On February 25, 1991, Mr. Silverman sent Mr. Sweeney a letter, a true and correct copy of which is attached as Exhibit C. (Exhibit omitted)

4. Mr. Guidry was aware of this correspondence at or about the time that it took place.

5. The Pension Funds, after this exchange of letters, decided to deliver (which delivery is contested by Mr. Guidry) the pension funds subject to this Court's February 28, 1991 Judgment, to Mr. Guidry at his home in Houston, Texas. The Pension Funds advised Sheet Workers International Association, Local No. 9 ("Union") of their intended action.

6. On Thursday, March 7, 1991, at approximately noon, David Pyka, a deputy United States Marshal working in the Southern District of Texas, and Walter Brauer, a Denver attorney for the Union, went to the First City, Texas Bank in downtown Houston, where they met First Grade Patrol Officer Billy Hunt and Investigator Victor Peschke, both of whom were licensed police officers employed by the City of Chateau Woods, Montgomery County, Texas. At that point, officers Woods and Peschke verified the count for and received on behalf of the Intervenor Trust Funds, the amount of $191,261.98.

7. The four individuals proceeded to the general vicinity of the home of Curtis Guidry. Attorney Brauer left the vehicle. Deputy Marshal Pyka, as well as the two Chateau Woods police officers in uniform, proceeded to the home of Curtis Guidry at 8703 Hinman, Houston, Texas.

8. Officers Woods and Peschke, followed by U. S. Marshal Pyka, proceeded to the door of Mr. Guidry's

home. Mr. Guidry came to the door, opened the burglar bars, and held the screen door open, while he spoke to the three officers. Officers Hunt and Peschke asked the individual if he was Curtis Guidry, and he acknowledged that he was. Officer Hunt was carrying the bag containing the money. The two officers stated that they were there on behalf of the trusts, to deliver to Mr. Guidry the pension payments due him.

9. Mr. Guidry stated that the money was not supposed to be delivered to his house, that the delivery was to be made elsewhere, and that he would not accept it. At that point, Officer Hunt, who was carrying the sack of money, reached into Mr. Guidry's home and set the sack of money at Mr. Guidry's feet. The same officer then showed to Mr. Guidry a receipt for the money and asked Mr. Guidry to sign it. Mr. Guidry refused.

10. Deputy U. S. Marshal Pyka identified himself and stated that he was there to serve a February 27, 1991 order to seize funds signed by the Honorable Sim Lake, a United States District Judge for the Southern District of Texas. Mr. Pyka extended his arm to give the order to Mr. Guidry, who refused to take it. Mr. Pyka sat the order down on the living room floor of Mr. Guidry, beside Mr. Guidry, and picked up the sack containing the money.

11. Deputy Marshal Pyka offered to open the sack and count it and requested that Mr. Guidry receipt for the money. Mr. Guidry refused to sign a receipt and stated that it was not necessary to count the money.

12. Deputy Marshal Pyka picked up the sack containing the money and he and the two police officers returned to Pyka's car and left the Guidry house.

13. Deputy Marshal Pyka then returned the money to downtown Houston, where it was again counted and receipted for by the Clerk of the United States District Court, where it resides at present.

14. Mr. Guidry never saw the contents of the bag.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action no. 84-M-879

CURTIS GUIDRY, Plaintiff,

vs.

SHEET METAL WORKERS NATIONAL PENSION FUND, et al., Defendants,

and

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL No. 9, Intervenor, and

SHEET METAL WORKERS' LOCAL NO 9 PENSION FUND, Party Under Rule 19, F.R.C.P.

and

FIRST INTERSTATE BANK OF DENVER, Garnishee

STIPULATION FOR DEPOSIT OF FUNDS

Plaintiff Curtis Guidry, Intervenor Sheet Metal Workers' International Association, Local No. 9 (the "Union"), Garnishee First Interstate Bank of Denver, and the Sheet Metal Workers International Association, Local 9 Pension Fund, the Sheet Metal Workers National Pension Fund, and the Sheet Metal Workers Local Unions and Councils Pension Fund (the "Pension Funds") by and through their respective counsel agree and stipulate as follows:

1. In a stipulation filed with the court on or about April 26, 1991, the parties hereto set forth the factual background of a delivery or attempted delivery of funds

owed by the Pension Funds to Guidry. Guidry contended that there was no delivery as the result of events of March 7, 1991, in Houston, Texas, while the Pension Funds and Union contended that there was such a delivery. The Texas delivery issue was the subject of a recommendation of the United States Magistrate Judge, Judge Borchers, dated June 20, 1991, in which Magistrate Judge Borchers recommended that no delivery had occurred. The Pension Funds objected to the June 20, 1991 recommendations of the United States Magistrate Judge on or about June 28, 1991, and the Union joined in those objections.

2. By Order dated May 30, 1991, the United States District Court for the Southern District of Texas, Judge Sim Lake, granted Guidry's motion for change of venue. A copy of the Order is attached hereto as Exhibit A. The Texas court ordered that the funds seized in Texas from Guidry by the United States Marshal will remain in the registry of the District Court in Houston, Texas "subject to further orders of the District Court of Colorado."

3. In a separate stipulation filed in the Texas action, a copy of which is attached hereto as Exhibit B, Guidry and the Union have agreed that the money now in the registry of the United States District Court in Texas be removed from the registry of that court, and transferred to the Curtis Guidry Pension Funds Account at the First Interstate Bank of Denver N.A., account number 87-31465, which is Curtis Guidry's account, subject to the garnishments effected in this action and to the July 1, 1991 stipulation and this stipulation. Guidry will not claim that this account belongs to any person or entity other than Curtis Guidry. This account has in it only

funds deposited by the pension funds. In addition, the Pension Funds agree to deposit in said account the difference between the amount transferred from the registry in Texas and $191,261.98 plus interest at the rate of 6.21% per annum from March 1, 1991, to the date of deposit. Upon said deposits, Guidry acknowledges receipt, subject to the garnishment, of all pension funds currently owed through August 31, 1991, but reserves his pending motion for attorney fees. In addition, the Pension Funds agree to deposit $645.00 (upon return of a stale check) plus interest at 6.21% from April 1, 1991 to the date of deposit. Furthermore, the Pension Funds agree to deposit the sum of $985.00 plus interest at 6.21% per annum from March 1, 1991 to the date of deposit.

4. The parties further stipulate and agree that all of said funds shall be maintained in Guidry's account subject to the garnishment on said account issued May 1, 1991, in this action, and that the funds are further subject to the entire stipulation of the parties entitled "Stipulation Regarding Writ of Garnishment with Notice of Exemption and Pending Levy Served on First Interstate Bank of Denver, May 1, 1991 and For Each Subsequent Month Until a Final Order Is Entered" which stipulation was dated July 1, 1991, and filed with this court on or about July 12, 1991. In other words, the funds, as well as future deposits, will be deposited into the Guidry account, and will be subject to the recommendation of Magistrate Judge Borchers dated May 15, 1991, and the final ruling on the objections. Guidry shall be entitled to such funds if the magistrate's recommendation is upheld subject to the Union's right to seek a stay. The parties further agree that it will be taken that Guidry has timely

asserted his claim for exemption to the funds deposited in accordance with this stipulation on the same basis as asserted in the claim for exemption filed with respect to the April 3, 1991 garnishment. Additionally, Guidry will be taken to have asserted his 100% exemption rights under the amended C.R.S. 13-54-102 contained in House Bill 91-1233 signed by the Governor of Colorado on May 1, 1991. Additionally, Guidry will be taken to have asserted any Texas state law exemptions to the funds derived from the Texas action.

5. The Bank agrees that it will maintain the deposits in Guidry's accounts on the same basis and subject to the same conditions set forth in the stipulation of the parties dated July 1, 1991, referred to in ¶ 4 above of this stipulation.

6. As a result of this stipulation, the issues regarding the validity of the writs of garnishment issued by the United States District Court for the District of Colorado in behalf of Guidry against the Union Labor Life Insurance Company, garnishee, on March 29, 1991, and the Union National Bank of Colorado, garnishee, on the same date are moot, except with respect to Guidry's motion for attorney fees, since pursuant to this stipulation all monies currently owed by the Pension Funds under this court's judgment dated February 28, 1991 have been, or will be, paid into the Curtis Guidry Pension Funds account at the First Interstate Bank of Denver N.A. Likewise, the issues concerning whether Guidry was delivered his pension in Texas on March 7, 1991 are moot, except with respect to Guidry's motion for attorney fees, because the parties have agreed that the money was delivered to Guidry's bank account pursuant to this stipulation. Therefore, the

court need not rule on said issues, but for the attorney fee issue.

7. The parties will cooperate to place said funds in such new or other accounts, consistent with this stipulation, which maximizes interest returned. If Guidry prevails, he reserves the right to seek 6.21% interest on the funds deposited under this stipulation to the extent not otherwise earned.

Dated this 23 day of August, 1991.

Respectfully submitted,

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No. 94-1300

Supreme Court, U.S.
FILED
FEB 28 1995
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In The

Supreme Court of the United States

October Term, 1994

CURTIS GUIDRY,

Petitioner,

v.

SHEET METAL WORKERS' NATIONAL PENSION FUND; SHEET METAL WORKERS' LOCAL UNIONS AND COUNCILS PENSION PLAN; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 9; SHEET METAL WORKERS' LOCAL NO. 9 PENSION FUND, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF RESPONDENT PENSION FUNDS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents Sheet Metal Workers' National Pension Fund, Sheet Metal Workers' Local Unions and Councils Pension Plan, and Sheet Metal Workers' Local No. 9 Pension Fund (hereinafter collectively "Pension Funds"), by their undersigned counsel and pursuant to U.S. Sup. Ct. Rule 15, submit the following brief in opposition to the Petition for Writ of Certiorari filed by Curtis Guidry. For the reasons set forth below, this brief addresses only the third of Guidry's four questions presented for review, namely:

> Should Guidry be awarded his reasonable attorneys' fees under ERISA, 29 U.S.C. § 1132(g), for fees arising after this Court's 1990 decision?

The Pension Funds accept Guidry's statement of the preliminary matters required by U.S. Sup. Ct. Rule 24(1)(a), (b), (d), (e), and (f).

STATEMENT OF THE CASE

Prior to 1981, Guidry was the chief executive officer of Respondent Sheet Metal Workers' International Association, Local 9 (hereinafter the "Union"), and a trustee of Respondent Sheet Metal Workers' Local No. 9 Pension Fund.[1] In 1982, Guidry pleaded guilty to embezzling more than $377,000 from the Union. Before serving his prison term for embezzlement, Guidry claimed benefits

[1] For a complete background, *see Guidry v. Sheet Metal Workers' National Pension Fund*, 641 F. Supp. 360 (D. Colo. 1986), *aff'd*, 856 F.2d 1457 (10th Cir. 1988), *rev'd*, 493 U.S. 365 (1990), *appeal after remand*, 10 F.3d 700 (10th Cir. 1993), *on reh'g en banc*, 39 F.3d 1078 (10th Cir. 1994).

from the three Pension Funds. After the Pension Funds denied Guidry's claims for benefits on the grounds that he had forfeited the right to his pensions because of criminal misconduct against the Union, Guidry filed suit in the U.S. District Court for the District of Colorado pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA").

The Union intervened in the litigation and filed claims against Guidry for recovery of the embezzled funds. In the course of the litigation, Guidry and the Union stipulated to the entry of a $275,000 judgment in the Union's favor and against Guidry. They agreed to litigate the availability of the constructive trust remedy requested by the Union.

The district court rejected the Pension Funds' claim that Guidry had forfeited his right to benefits; however, it concluded that ERISA did not preclude the imposition of a constructive trust over those funds in favor of the Union. 641 F. Supp. at 363. The district court judgment was affirmed by the U.S. Court of Appeals for the Tenth Circuit. 856 F.2d 1457 (10th Cir. 1988). This Court reversed, 493 U.S. 365 (1990), holding that ERISA's preclusion against the alienation of pension benefits precluded placing a constructive trust on Guidry's pension benefits. 493 U.S. at 375-76.

After this Court's decision, Guidry moved for reimbursement of his attorneys' fees expended in the litigation. The district court denied that request as to both the Union and the Pension Funds. It held that the litigation between Guidry and the Union did not arise under ERISA, so that the Union could not be subjected to

ERISA's provision regarding attorneys' fees. As to both the Union and the Pension Funds, the court ruled that Guidry was not entitled to an award of fees under the guidelines for recovery of fees in ERISA cases set forth in *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978). Guidry did not appeal the district court's denial of fees.

In accordance with this Court's remand, on February 28, 1991, the district court entered judgment ordering the Pension Funds to pay past and future pension benefits to Guidry. At the same time, the Union made efforts to satisfy its $275,000 judgment against Guidry from those pension payments. The Union registered its judgment against Guidry in the U.S. District Court in Houston, Texas, where Guidry resided. When the Pension Funds tendered some $190,000 to Guidry at his home in Texas, in satisfaction of the award of back pension benefits, the funds were immediately seized by a U.S. Marshal and deposited into the registry of the Texas court. *See* Guidry Appendix, A-74. The Union also made efforts to collect its judgment through garnishments on a Denver bank account established by Guidry, into which the Pension Funds were to deposit his future monthly pension amounts as they became due.

These activities gave rise to post-judgment proceedings in the U.S. District Courts in Colorado and in the Southern District of Texas. On August 23, 1991, the parties stipulated that the money in the court registry in Texas would be transferred to the Denver bank account which was the subject of the Union's garnishment efforts, and that past and future pension payments would be deposited into that account and be subject to the Union's initial garnishment. Guidry Appendix, A-76 to A-80.

On January 8, 1992, the district court in Colorado entered its Findings, Conclusions and Order on Post-Judgment Issues (Guidry Appendix, A-66 to A-71). The court concluded that the ERISA exemption from garnishment, 29 U.S.C. § 1056(d)(1), applied to the payments made by the Pension Funds into the Guidry account, and noted that its conclusion was "mandated by the law of this case" as announced by this Court in its 1990 decision. Guidry Appendix, A-69. It further concluded that the Pension Funds' attempt to satisfy the judgment against them by the tender made in Texas was not legally effective; that the Pension Funds and the Union had not violated any order of the court and had not acted in contempt of court; and that neither the Texas exemption statute nor the Colorado exemption statute applied to the case.

The district court also denied Guidry's motion for recovery of his attorneys' fees and costs incurred subsequent to the district court's February 28, 1991, judgment in his favor. Guidry had argued that an award of fees was now appropriate even though the court had previously denied such an award, because the Union and the Pension Funds had shown "an obstinate and unbending attitude" toward this Court's decision and had conspired to continue to deprive him of his pensions. The district court rejected the argument, noting that the post-judgment dispute went beyond the initial action to recover plan benefits, and involved "both the plaintiff's claim of exemption under ERISA and the Union's efforts to collect on its judgment." Guidry Appendix, A-70. The court concluded that the attempted tender and seizure of funds in Texas was not forum shopping or misconduct by the

parties or by counsel, but instead constituted "diligent efforts" to avoid injustice. Although it had ruled those efforts invalid, the court declined to "add to the inequity by awarding attorney's fees." *Id.*

A three-member panel of the U.S. Court of Appeals for the Tenth Circuit, with one dissent, reversed the district court on the garnishment issue, concluding that the ERISA anti-alienation provision did not protect funds paid to and received by Guidry. 10 F.3d at 710. It also held that exemptions from garnishment provided by Colorado law were preempted by ERISA. *Id.* at 713. As to Guidry's cross-appeal of the district court's denial of his motion for attorneys' fees, the panel noted simply that "[b]ecause he is not the prevailing party, this issue is moot." *Id.* at 716.

Upon rehearing *en banc*, the Tenth Circuit agreed with the panel that ERISA's anti-alienation provision did not apply to protect Guidry's pension funds from garnishment once they were paid to and received by him. 39 F.3d at 1083. However, it reversed the panel on the issue of ERISA's preemption of state garnishment laws, and held that the funds were exempt from garnishment to the extent provided by Colorado law – i.e., 75 percent. *Id.* at 1083-84. The Tenth Circuit's decision on the attorneys' fees issue is set forth in a single footnote at the end of the majority opinion:

> In his original appeal, Mr. Guidry claimed that the district court abused its discretion in denying his request for attorneys fees. On rehearing, Mr. Guidry made specific arguments and also requested a rehearing on all other issues within

> the panel opinion, although he did not specifically reassert his earlier argument on the fee issue. Assuming that the issue is properly before the en banc court, we find no grounds for reversing the district court's ruling that Mr. Guidry was not entitled to a fee award under the ERISA fee-shifting provision, 29 U.S.C. § 1132(g). *See Downie v. Independent Drivers Ass'n Pension Plan*, 945 F.2d 1171, 1172 (10th Cir. 1991) (district court decision on a fee award under section 1132(g) reviewed for abuse of discretion).

Id. at 1087, n.11.

SUMMARY OF ARGUMENT

Regardless of this Court's decision on the other issues raised in Guidry's Petition for Writ of Certiorari, the Court should deny certiorari on Guidry's third question presented for review (relating to the denial of his motion for attorneys' fees), the only issue which still involves the Pension Funds.

The attorneys' fees issue is entirely tangential to the main questions raised in this case, and was barely touched upon by the courts below. It is an issue of isolated significance, not of public importance. The issue does not involve any conflict among the circuits or unsettled question of law that needs to be resolved by this Court.

The law regarding attorneys' fee awards in ERISA cases is well settled, and was properly applied by the lower courts in this case. ERISA commits the decision on

attorneys' fees to the sound discretion of the district court. The cases have identified factors which are to guide courts in the exercise of this discretion. Application of those factors in this case supports the district court's denial of fees.

As the district court found, the parties against whom fees were sought in this case did not act in bad faith, and had a legitimate legal basis for their position. The unique circumstances of this case significantly lessen any potential deterrent effect from an attorneys' fees award, and likewise lessen the amount of "benefit," if any, to other plan participants from the decision in Guidry's favor. Moreover, it was not improper for the district court to take Guidry's criminal conduct into account in denying his motion for fees.

Because there are no "special and important reasons" for granting review of this issue, and because the district court's exercise of its discretion in denying fees was consistent with settled principles of law applicable to the issue, certiorari should be denied.

ARGUMENT

Although the Union and Guidry have continued to litigate the legality of garnishment of pension funds subsequent to this Court's first opinion, the Pension Funds effectively withdrew from the litigation upon the parties' August 23, 1991, stipulation providing that all monies owed by the Pension Funds to Guidry would be paid into Guidry's Denver bank account. Guidry Appendix, A-76 to A-80. The Pension Funds' involvement in the case

since then has been limited to opposition to Guidry's request for attorneys' fees, which were sought both from the Pension Funds and from the Union. In this brief, the Pension Funds address only the attorneys' fees issue (question three in Guidry's Petition), and take no position on the other questions presented for review.

As to attorneys' fees, the Pension Funds believe that certiorari review of this issue should be denied regardless of this Court's determination of the other issues raised in Guidry's petition.

I. THERE ARE NO UNSETTLED PRINCIPLES OF LAW, CONFLICTS AMONG THE CIRCUITS, OR OTHER "SPECIAL AND IMPORTANT REASONS" FOR GRANTING CERTIORARI REVIEW OF THE DENIAL OF GUIDRY'S MOTION FOR ATTORNEYS' FEES, AN ISSUE WHICH IS OF SIGNIFICANCE ONLY TO THE PARTIES AND WHICH IS WHOLLY TANGENTIAL TO THE MAIN ISSUES IN THIS CASE.

A petition for a writ of certiorari will be granted only when there are "special and important reasons therefor." U.S. Sup. Ct. Rule 10.1. Such reasons may include, for example, resolution of a conflict among the circuit courts of appeals or state courts of last resort concerning the meaning of a provision of federal law. *Braxton v. United States*, 500 U.S. 344, 347 (1991). This Court has stated in the past that certiorari review is not appropriate on issues which are of "isolated significance" and not of public importance. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 76-77 (1955).

Under these standards, certiorari should be denied on Guidry's attorneys' fees issue. This issue is wholly tangential to the main issues in this case, and was barely touched upon by the courts below. Whatever "nationwide significance" the other issues in Guidry's Petition may have, the attorneys' fee issue has no such significance. Neither Guidry nor any of the lower courts has identified any dispute over the tests or other legal principles applicable to a determination of this issue, or any conflict among the circuits that needs to be resolved by this Court. Moreover, including the attorneys' fees issue in any grant of certiorari in this case would involve parties (the Pension Funds) whose liability, except for attorneys' fees, has been long since resolved, and who are otherwise not directly affected by whatever decision is reached on the remaining issues.

II. THE DISTRICT COURT'S DENIAL OF ATTORNEYS' FEES IN THIS CASE WAS A PROPER EXERCISE OF THE COURT'S DISCRETION, AND WAS CONSISTENT WITH SETTLED PRINCIPLES OF LAW APPLICABLE TO THIS ISSUE.

Certiorari should be denied because the attorneys' fees issue was properly resolved by the courts below. ERISA by its terms commits the decision whether to award attorneys' fees to the sound discretion of the district court. The district court's decision to deny fees in this case was a proper exercise of that discretion, and is consistent with conclusions reached by other courts applying well-established tests for deciding whether to award fees. The Tenth Circuit properly limited its review to determining whether there were grounds for finding

an abuse of discretion. There is no basis for further review of the issue by this Court.

A. In Exercising their Discretion to Grant or Deny Attorneys' Fees in ERISA Cases, Courts are to Consider Factors Such as the Bad Faith of the Offending Parties, the Potential Deterrent Effect of a Fee Award, and the Merits of the Parties' Positions.

The award of attorneys' fees in this case is governed by ERISA § 502(g)(1) (29 U.S.C. § 1132(g)(1)), which provides in pertinent part:

> In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

Consistent with the language of the statute, the courts have recognized that an award of attorneys' fees in ERISA cases is committed to the sound discretion of the district court, and is reviewable on appeal only for abuse of discretion. *E.g., Custer v. Pan American Life Ins. Co.*, 12 F.3d 410, 422 (4th Cir. 1993); *Ramsey v. Colonial Life Ins. Co. of America*, 12 F.3d 472, 480 (5th Cir. 1994); *Tiemeyer v. Community Mut. Ins. Co.*, 8 F.3d 1094, 1102 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1371 (1994); *Consolidated Beef Industries, Inc. v. New York Life Ins. Co.*, 949 F.2d 960, 966 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1670 (1992); *Downie v. Independent Drivers Ass'n Pension Plan*, 945 F.2d 1171, 1172 (10th Cir. 1991); *Florence Nightingale Nursing Service, Inc. v. Blue Cross/Blue Shield of Alabama*, 41 F.3d 1476, 1485 (11th Cir. 1995).

Unlike the mandatory-fee shifting provisions of some statutes, a fee award is not required in ERISA cases even when one party prevails on the merits. *Quesinberry v. Life Ins. Co. of North America*, 987 F.2d 1017, 1030 (4th Cir. 1993); *Saltarelli v. Bob Baker Group Medical Trust*, 35 F.3d 382, 387 (9th Cir. 1994); *Freeman v. Continental Ins. Co.*, 996 F.2d 1116, 1119 (11th Cir. 1993).

In assessing whether to award fees, many courts have adopted the five-factor test first announced by the Tenth Circuit in *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978). That test directs the courts to consider:

(1) The degree of the offending parties' culpability or bad faith;

(2) The degree of the ability of the offending parties to personally satisfy an award of attorneys' fees;

(3) Whether or not an award of attorneys fees against the offending parties would deter other persons acting under similar circumstances;

(4) The amount of benefit conferred on members of the pension plan as a whole; and

(5) The relative merits of the parties' position.

Id. at 465. *See also Quesinberry*, 987 F.2d at 1029; *Ramsey*, 12 F.3d at 480; *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1303 (6th Cir. 1991); *Saltarelli*, 35 F.3d at 388; *Florence Nightingale*, 41 F.3d at 1485. No one factor is decisive, and the courts may consider other factors in addition to the five enumerated here. *Plumbers and Steamfitters Local No. 150 Pension Fund v. Vertex Construction Co.*, 932 F.2d 1443, 1453 (11th Cir. 1991) (citing *Ironworkers Local No. 272 v.*

Bowen, 624 F.2d 1255, 1266 (5th Cir. 1980), for the proposition that "[n]o one of these factors is necessarily decisive, and some may not be apropos in a given case, but together they are the nuclei of concerns that a court should address. . . . In particular types of cases, or in any individual case, however, other considerations may be relevant as well"); *Quesinberry*, 987 F.2d at 1029; *Armistead*, 944 F.2d at 1304.

Attorneys' fees may be denied under this test even if one or more factors would support an award of fees. *See Ramsey*, 12 F.3d at 480 (no abuse of discretion in denying fees, even though defendant could afford to pay the attorneys' fee award); *Tiemeyer*, 8 F.3d at 1102 (same); *Davidson v. Canteen Corp.*, 957 F.2d 1404, 1409 (7th Cir. 1992) (denial of fees to plaintiffs not an abuse of discretion even though factors two and three of five-factor test weighed in plaintiffs' favor).

As to the first of the five *Eaves* factors, courts have been particularly willing to uphold denials of attorneys' fees where there has been no illegal or bad faith conduct on the part of the party against whom fees were sought. *See Custer*, 12 F.3d at 423; *Ramsey*, 12 F.3d at 480; *Harms v. Cavenham Forest Industries, Inc.*, 984 F.2d 686, 694 (5th Cir.), *cert. denied*, 114 S. Ct. 382 (1993); *Davidson*, 957 F.2d at 1410; *Freeman*, 996 F.2d at 1120. Similarly, denial of fees is appropriate where there was a legitimate legal basis for the position taken by the party against whom the fees were sought (*Eaves* factor five). *Custer*, 12 F.3d at 423; *Ramsey*, 12 F.3d at 480; *Harms*, 984 F.2d at 694; *Tiemeyer*, 8 F.3d at 1102; *Consolidated Beef Industries*, 949 F.2d at 966 (8th Cir. 1991) (CBE's claims were "serious and involved complicated legal issues that were sufficiently debatable

to justify plaintiff's pursuit of the claims"); *Freeman*, 996 F.2d at 1120.

In applying the other factors, courts have upheld denials of fees where the fee award would be unlikely to deter others (factor three), and where the successful party did not vindicate the rights of any other plan participants or benefit other persons (factor four). *See Custer*, 12 F.3d at 423; *Harms*, 984 F.2d at 694; *Davidson*, 957 F.2d at 1410; *Freeman*, 996 F.2d at 1120. Deterrent effect and benefit to others are often found to be lacking in cases involving unique circumstances. In *Ramsey*, for example, the appellate court upheld the district court's finding that the "uniqueness of the circumstances greatly diminished the deterrent effect of the ruling" and that "Ramsey's suit had no applicability to other ERISA participants." 12 F.3d at 480.

B. The District Court's Denial of Attorneys' Fees to Guidry was Appropriate Under the Principles Outlined Above.

The district court's denial of attorneys' fees to Guidry in this case was a proper exercise of its discretion, and was entirely consistent with the general principles set forth above. The mere fact that this Court had previously ruled that the Pension Funds were required to pay Guidry's pension did not make the parties' subsequent attempts to satisfy the Union's judgment out of those funds into misconduct or bad faith – as the district court recognized. Guidry Appendix, A-70. Moreover, as the district court stated in its Memorandum Opinion and

Order denying Guidry's previous motion for fees,[2] an award of attorneys' fees to Guidry would not deter similar conduct by similar defendants in the future, given the uniqueness of the case and the small likelihood that the precise issue would arise in the future. *See Ramsey*, 12 F.3d at 480. Similarly, although Guidry's ultimate victory on the constructive trust issue might have conferred a theoretical benefit on other embezzlers or similarly situated plan participants, that limited benefit should not outweigh factors counseling strongly against an award of fees under the unusual facts of this case.

As to the "relative merits of the parties' positions," it should be remembered that the dispute between Guidry and the Pension Funds (as distinguished from the dispute between Guidry and the Union) was over the efficacy of

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[2] In its (unpublished) Memorandum Opinion and Order of December 31, 1990, the district court undertook a detailed analysis of the merits of Guidry's first attorneys' fee claim under the *Eaves* five-factor test. It found that the parties against whom fees were sought had not acted in bad faith, and that their arguments had been persuasive to the district court and to the court of appeals even though Guidry ultimately prevailed in this Court. It further found that the ability of the defendants to satisfy the judgment need not be addressed because the other factors supported a denial of a fee award; that awarding fees to Guidry would not deter similar conduct from similar defendants in the future under the unique circumstances of the case; that any benefits to other parties from Guidry's victory were insignificant under the unusual facts of the case; and that although Guidry ultimately prevailed on the merits, the defendants' position was reasonable and responsible. The court also stated that, while it was not to adopt a punitive attitude against Guidry, his criminal conduct was an appropriate factor to consider in determining whether to award fees.

the Pension Funds' tender of benefits in Texas. Although that tender was found later to have been ineffective, no court found it to have been illegal or otherwise so lacking in merit as to be punishable by an attorneys' fee award. Moreover, following that attempted tender, the Pension Funds complied with Guidry's request to transfer the moneys at issue to his Colorado bank account; and they did so pursuant to an August 1991 stipulation, long before the district court ruled on the issue.

Finally, as noted above, courts may properly consider other factors as well as the five enumerated *Eaves* factors in deciding whether to award fees. The district court appears to have taken into account Guidry's criminal conduct in deciding that the equities did not support an award of fees. Guidry Appendix, A-70. Contrary to Guidry's argument to this Court, it was not inappropriate for the district court to have done so. *See Plumbers and Steamfitters Local No. 150 Pension Fund*, 932 F.2d at 1453.

All these factors, taken together, amply support the district court's decision to deny fees to Guidry. Although the district court did not articulate all five of the *Eaves* factors in its second attorneys' fees ruling (as it had done in the first), that fact does not somehow require reversal of its determination. *See Florence Nightingale*, 41 F.3d at 1485 (upholding district court's denial of fees even though court focused only on one factor, the degree of the offending party's bad faith); *Plumbers and Steamfitters Local No. 150 Pension Fund*, 932 F.2d at 1453 (no abuse of discretion, even though district court considered only first and fifth factors of *Eaves* test); *Armistead*, 944 F.2d at 1304 (no remand necessary to require court to consider factors two through five of test, where such consideration

would not lead to a different result). The fact that the district court had gone through the five-factor *Eaves* analysis in detail when it denied Guidry's initial motion for fees (*see* n. 2, above) demonstrates that the court was familiar with the test. As in *Armistead*, nothing would be served by remanding this issue to the district court for a renewed articulation of the *Eaves* test, when such articulation would clearly not lead to a different result.

In his Petition, Guidry argues in regard to the attorneys' fee issue that "since the congressional purpose is that actual pension benefits be received, Guidry should be awarded his statutory reasonable attorney fees under ERISA . . . " (Petition, p. 13). This argument is illogical. It is undisputed that, in accordance with this Court's previous opinion, Guidry is receiving his pension benefits. It does not follow that anyone receiving pension benefits is also entitled to an award of attorneys' fees under ERISA. Congress could have included such a provision in ERISA, but it did not. Instead, the statute simply leaves the award of fees to the discretion of the court.

The district court's exercise of its discretion was appropriate under the unique circumstances of this case, and should not be disturbed by this Court.

CONCLUSION

There are no "special and important reasons" for granting certiorari review of the denial of Guidry's request for attorneys' fees. The district court's ruling on fees was entirely consistent with well-established principles of law applicable to this issue. The Pension Funds

accordingly respectfully request that, regardless of this Court's resolution of the remaining issues, it deny Guidry's Petition to the extent that it seeks review of the district court's denial of his motion for attorneys' fees.

Respectfully submitted this 28th day of February, 1995.

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(3)

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No. 94-1300

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CURTIS GUIDRY,
Petitioner,
v.

SHEET METAL WORKERS NATIONAL PENSION FUND; SHEET METAL WORKERS LOCAL UNIONS AND COUNCILS PENSION PLAN; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 9; SHEET METAL WORKERS LOCAL NO. 9 PENSION FUND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 9

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QUESTIONS PRESENTED

I. Should this Court review the 10th Circuit's determination that the "law of the case" doctrine did not require a holding that Guidry's pension benefits are exempt from garnishment after they have been paid to him and deposited in his bank account?

II. Should this Court review the 10th Circuit's ruling that ERISA's anti-alienation provision does not exempt from garnishment benefits after receipt by the pensioner?

III. Should this Court grant certiorari to determine whether Guidry is entitled to attorneys' fees against the Union under ERISA's attorneys' fee statute, when the Union's action against Guidry was not premised upon ERISA.

IV. Should this Court grant certiorari to determine the applicability and meaning of a Texas state exemption statute?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1300

CURTIS GUIDRY,

Petitioner,

v.

SHEET METAL WORKERS NATIONAL PENSION FUND; SHEET METAL WORKERS LOCAL UNIONS AND COUNCILS PENSION PLAN; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 9; SHEET METAL WORKERS LOCAL NO. 9 PENSION FUND, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 9

PERTINENT STATUTES AND REGULATIONS

Texas Property Code Title 5 § 42-0021(a) and (c) provides as follows:

> (a) . . . . a person's right to the assets held in or to receive payments, whether vested or not, under any stock bonus, pension, profit-sharing, or similar plan . . . is exempt from attachment, execution, and seizure for the satisfaction of debts.

> (c) Amounts distributed from a plan or contract entitled to the exemption under Subsection (a) are not subject to seizure for a creditor's claim for 60 days after the date of distribution if the amounts qualify as a nontaxable rollover contribution under Section 402(a)(5), 403(a)(4), 403(b)(8), or 408(d)(3) of the Internal Revenue Code of 1986.

The U.S. Department of Treasury Regulations 29 C.F.R. § 1.401(a)-13 provide as follows:

> (b) No assignment or alienation.—(1) General rule. Under § 401(a)(13), a trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process.
>
> (c) Definition of assignment and alienation.—(1) In general. For purposes of this section, the terms "assignment" and "alienation" include— . . . .
>
> (ii) Any direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary.

STATEMENT OF THE CASE

In 1982, Curtis Guidry, chief executive officer of Sheet Metal Workers International Association Local 9 ("the Union") pled guilty to embezzling more than $377,000.00 from the Union in violation of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 501(c). He thereafter sued two of the respondent pension plans under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et seq., claiming they had wrongfully refused to pay him pension benefits. The Union intervened, joined the third pension plan and asserted six claims against Guidry, one under the LMRDA

supra, and five under state law theories claiming Guidry's liability for the embezzlements. Guidry and the Union then stipulated to entry of a $275,000.00 judgment against Guidry. The District Court ordered the pension funds liable to Guidry for his pensions, but subjected those benefits to a constructive trust in favor of the Union until the Union's judgment and interest thereon were satisfied. The United States Court of Appeals for the Tenth Circuit affirmed District Court, and this Court granted certiorari to review the Tenth Circuit's original decision.

Hence, when this Court considered this case initially, Guidry had received no pension benefits. Guidry's continuing benefits were accruing in the constructive trust established by the District Court. However, on January 17, 1990, this Court held that the constructive trust violated ERISA's anti-alienation provision, ERISA § 206(d) (29 U.S.C. § 1056(d)(1)). The Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings consistent with its opinion. *Guidry v. Sheet Metal Workers National Pension Fund et al.,* 493 U.S. 365 (1990), hereinafter, *Guidry I.*

Following remand, the District Court ordered the pension plans to deliver Guidry's pension benefits to him and Guidry sought attorneys' fees against the Union based upon his successful *defense* under ERISA. In a Memorandum Opinion and Order dated December 31, 1990, the District Court denied Guidry's claim for attorneys' fees holding that the ERISA attorneys' fees statute, 29 U.S.C. § 1132(g)(1) did not apply to the Union since the Union's action against Guidry was brought under the LMRDA and not ERISA. Guidry did not appeal this denial of attorneys' fees.

The Union sought to obtain Guidry's pension benefits through legal process immediately after their delivery. First, the pension funds tendered the benefits in Texas. Appendix A-72-A-75. When that episode became the subject of legal dispute, the parties stipulated that all past

and ongoing pension benefits would be deposited into a bank account in Denver, Colorado, subject to a writ of garnishment issued May 1, 1991 pending the District Court's final disposition of Guidry's claims for exemption from the garnishments. Appendix A-76-A-81.

The District Court held that all of the funds deposited in Guidry's Denver account were exempt under ERISA's anti-alienation provision and that this result was mandated by the "law of the case" in *Guidry I*. Appendix A-69. In view of this finding, the District Court held Guidry's claims for exemption under Texas and Colorado law inapplicable. Appendix A-69-A-70. The Court denied plaintiff's second claim for attorneys' fees under ERISA, based upon the collection efforts after the District Court's December 31, 1990 Order denying attorneys fees, again noting that the Union's action against Guidry was based upon the LMRDA, not ERISA, and that it would be inequitable to award attorneys' fees in any event. Appendix A-70.

A three judge panel of the Tenth Circuit Court of Appeals, with one judge dissenting, held that the "law of the case" doctrine did not apply, since this Court did not decide the issue of the scope of ERISA's anti-alienation provision in relation to benefits which had already been paid to the beneficiaries, as no such benefits *had been* paid to Mr. Guidry at the time of *Guidry I*. Appendix A-9. Relying upon Department of the Treasury Regulations defining assignment and alienation as legal process "enforceable against the plan" the panel further held that ERISA's anti-alienation provision does not extend to benefits already paid from the plan. Appendix A-15-A-27. The Court held Guidry's claim for a Texas exemption moot since the pension funds under consideration were held in a Colorado bank under a Colorado writ of garnishment, and held the relevant Colorado statute preempted by ERISA. Appendix A-32-A-33. Likewise, it held Guidry's appeal for attorneys' fees moot, since he

was not the prevailing party on his ERISA defense. Appendix A-36.

The Tenth Circuit Court of Appeals en banc affirmed the holding of the panel on the ERISA issue. Appendix A-46. However, the Court applied the Colorado wage exemption statute, C.R.S. § 13-54-104(2)(a), and held 75% of the deposited funds to be exempt. Appendix A-50-A-60. The Court also held the Texas Exemption Statute inapplicable to the Colorado Garnishment (Appendix, A-60-A-61) and affirmed the District Court's ruling denying attorneys' fees. (Appendix, A-61 n.11).

GROUNDS WHY THIS CASE SHOULD NOT BE REVIEWED IN THIS COURT

I. THIS COURT SHOULD NOT REVIEW THE COURT OF APPEALS' REFUSAL TO APPLY THE "LAW OF THE CASE" DOCTRINE, WHICH DOCTRINE HAS BEEN CLEARLY ENUNCIATED BY THIS COURT.

Contrary to Guidry's contention, this Court need not grant certiorari in this case to enunciate the doctrine that lower courts must follow the decisions of higher courts in the judicial hierarchy. This proposition is so well known and routinely applied, it requires little embellishment. This Court has explained the doctrine succinctly as follows:

> When a case has been once decided by this Court on appeal, and remanded to the Circuit Court, whatever was before this Court and disposed of by its decree is considered as finally settled. The Circuit Court is bound by the Decree as the law of the case; and must carry it into execution, according to the mandate. . . . But the Circuit Court may consider and decide any matters left open by the mandate of this court;

Re: Sanford Fork & Tool Co., 160 U.S. 247, 255 and 256 (1895). More recently, this Court reasserted that the doctrine of "law of the case" comes into play only with respect to issues previously determined. *Quern v. Jordan,* 440 U.S. 332, 347, n.18 (1979).

Thus, the Tenth Circuit had to decide whether *Guidry I* had determined the applicability of ERISA's anti-alienation provision to benefits after they had been received by the plan beneficiary and deposited in his bank account. In its thorough treatment of this issue in the panel decision, the Court of Appeals correctly held that *Guidry I* did not decide the issue, either directly or by implication.

First, the *Guidry I* court did not *directly* determine whether the anti-alienation provision exempted benefits in the hands of the pensioner, because that issue was not before it. When this Court decided *Guidry I*, all pension benefits had been deposited into a constructive trust in accordance with the District Court's original order. Guidry had received none of the pension benefits at issue. Whether pension benefits may be garnished after they have been disbursed by the plan presents substantial legal questions distinct from the issue in *Guidry I*—whether a constructive trust could be imposed to intercept the benefits before they reached Guidry at all. The parties did not brief the former issue and this Court did not consider or decide it. While *Guidry I* points out that the anti-alienation clause reflects a decision to safeguard a "stream of *income*," [emphasis supplied] the decision nowhere expresses any restraints upon the disposition of that income once in the hands of the beneficiary.

Second, Guidry selects short excerpts from the Court's decision in *Guidry I* which he contends *imply* the result he seeks. However, the entirety of the Court's opinion must be viewed in the context of the factual circumstances which obtained at the time. In holding that ERISA's anti-alienation provision is consonant with other statutory provisions designed to safeguard retirement income, the Court so held only with respect to the receipt of that income, and not its destiny after receipt. Likewise, the phrase "stream of income" refers to a flow of funds *to* the pensioner without implicating the legal status of the funds after receipt.

As the Tenth Circuit correctly points out, exemption statutes fall broadly into two categories. Some cover only funds which are owed to the creditor while in the possession of a third party and others also cover the funds after receipt by the creditor from the third party.[1] In *Guidry I*, this Court did not prematurely determine into which of these two categories ERISA's anti-alienation provision fell. That determination involved complicated factors which this Court did not consider, because the issue was not before it. A grant of certiorari here would do nothing to elucidate the already clear principle that the "law of the case" doctrine applies only to issues previously determined by the higher Court.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE TENTH CIRCUIT'S HOLDING, UPON WHICH ALL JURISDICTIONS CONSIDERING THE ISSUE AGREE, THAT ERISA'S ANTI-ALIENATION CLAUSE DOES NOT EXEMPT BENEFITS AFTER PAYMENT.

Since this Court's decision in *Guidry I*, at least two other Federal circuits besides the Tenth Circuit and two state supreme courts have considered the reach of ERISA's anti-alienation provision to paid benefits. Every jurisdiction which has considered the issue has agreed with the Tenth Circuit that ERISA does not prohibit the alienation of benefits under the dominion of the pensioner.[2]

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[1] The Social Security Act, 42 U.S.C. § 407 is an example of the latter type of statute. *Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973). The Federal Consumer Credit Protection Act (15 U.S.C. §§ 1672 and 1673) is an example of the former. *Usery v. First National Bank*, 586 F.2d 107 (9th Cir. 1978).

[2] The Third Circuit expressly agreed with the holding of the 10th Circuit panel decision in the present case in *Trucking Employees of New Jersey Welfare Fund Inc. v. Colville*, 16 F.3rd 52 (3rd Cir. 1994). The Fourth Circuit, in an unpublished per curium opinion, *Nationsbank of North Carolina v. Shumate* (1994 U.S. App. Lexis 36695), affirmed a similar holding of the District Court in *NC&B Financial Services, Inc. v. Shumate*, 829 F. Supp. 178 (W.D. Va. 1993). In accord, *Fickhoff v. Eickhoff*, 263 Ga. 498, 435

In contrast, Guidry can point to no jurisdiction which has adopted his theory that ERISA's anti-alienation provision exempts benefits under the dominion of the pensioner. The lower courts have been unanimous in rejecting Guidry's theory, because it is inconsistent with the statutory language of ERISA itself as well as its interpretive regulations.

The anti-alienation clause itself does not exempt any pension benefits, but requires *pension plans* to provide that plan benefits may not be assigned or alienated. 29 U.S.C. § 1056(d)(1). Accordingly, ERISA requires the plans to establish restrictions in the nature of spendthrift trusts. A spendthrift trust restricts the transfer, assignment or alienation of the beneficiary's right to future payments of income or principal from the trust, but does not exempt benefits once paid to the beneficiary, since private trustors lack the authority to influence the disposition of funds after they are paid from the trust. Erwin N. Griswold, *Spendthrift Trusts,* Matthew Bender, Second Edition, 1947 § 370, page 454. Thus, Congress' failure to proscribe directly the alienation of plan benefits compels the conclusion that after the plans have paid benefits, funds are no longer subject to ERISA's anti-alienation requirement.

The Treasury Department regulations interpreting ERISA confirm this view.[3] While the regulations broadly prohibit the assignment and alienation of plan benefits, they define assignment and alienation as "a right of interest enforceable *against the plan. . . .*" 29 C.F.R. § 1.401(a)-13(b) and (c). [Emphasis supplied] Had the administrative agency construed ERISA to exempt

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SE.2d 914 (1993) and *Brosamer v. Mark*, 561 N.E. 2d 767 (Ind. 1990).

[3] This Court relied upon the Treasury Department regulations in reaching its conclusion in *Guidry I*. See *Guidry I*, 493 U.S. at 371, fn. 10.

benefits in the hands of the beneficiary, it would have defined assignment and alienation to include the enforcement of legal process against the plan beneficiary.

This Court need not grant certiorari only to confirm what has become a correct and uniformly accepted principle of federal law, that ERISA's anti-alienation provision covers only funds in the plan and not those paid to the beneficiary. A Supreme Court holding to this effect would serve no salutary purpose.

III. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE DENIAL OF AN AWARD OF ATTORNEYS' FEES AGAINST THE UNION.

After the remand from this Court in 1990, Guidry sought attorneys' fees against the Union and the pension funds in the District Court. In a Memorandum Opinion and Order dated December 31, 1990, the District Court denied Guidry's Motion for Attorneys' Fees against the Union and the plans. Regarding the Union, the Court stated that since the litigation between the Union and Guidry was based upon the LMRDA, the ERISA fee statute, 29 U.S.C. § 1132(g)(1), was not applicable to the Union. Guidry did not appeal the District Court's denial of attorneys' fees at that point. Therefore, Guidry's present claim for attorneys' fees must be based entirely on the collection litigation since the District Court's December 31, 1990 Order.

Thereafter, the Union pursued various collection efforts against Guidry resulting in stipulations between the parties designed to facilitate a decision on the principal issues. Then, in its Findings, Conclusions and Order on post judgment issues of January 8, 1992, the District Court, while ruling in favor of Guidry on those post judgment issues, denied his Motion for Attorneys' Fees against the Union, again noting that 29 U.S.C. § 1132(g) is inapplicable to the union since its claim against Guidry was based upon the LMRDA. Appendix A-70.

The District Court was correct in its holding that the Union's action against Guidry and its subsequent collection efforts do not constitute an action under ERISA for which attorneys' fees may be awarded under 29 U.S.C. § 1132(g), and further did not abuse its discretion in deciding that Guidry would not be entitled to an award of fees under ERISA's balancing test for such awards in any event. See Brief of Respondent Pension Funds in Opposition to Writ of Certiorari.

IV. THIS COURT SHOULD NOT GRANT CERTIORARI TO DETERMINE THE APPLICABILITY AND MEANING OF THE TEXAS EXEMPTION STATUTE.

According to the parties' stipulation, the pension funds attempted delivery of Guidry's past due pension benefits in Houston, Texas on March 7, 1991. (Appendix A-73, ¶ 6). Guidry did not accept that attempted delivery. (Appendix A-74, ¶ 9). Guidry contended that no delivery resulted from the events of March 7, 1991 (Appendix A-77, ¶ 1). The parties then stipulated to remove the money tendered to Guidry in Texas from the Registry of the United States District Court in Texas to a bank account in Denver, Colorado where it would be subject to garnishments served by the Union. (Appendix A-77 and 78, ¶¶ 3 and 4). The parties further stipulated that Guidry asserted a Texas state law exemption with regard to the funds derived from the Texas action. (Appendix A-79, ¶ 4).

The Tenth Circuit found the Texas exemption statute inapplicable for a number of reasons. Guidry never was able to explain how a Texas exemption statute would apply to an attempted delivery of funds in Texas that he himself contends was unsuccessful. The stipulation which allows Guidry to *assert* the Texas exemption, does not bind the Court to find it applicable. Although Guidry now argues that the stipulation itself established the applicability of the Texas state law, this Court should not grant

certiorari for the purpose of construing a stipulation between the parties.

Furthermore, even if this Court were to adopt Guidry's view of the stipulation, it would then be faced with construing the Texas statute as a matter of first impression, and were it to do so, it would have to conclude against Guidry in any case. The statute does not exempt pension benefits after they are received. It exempts only "a person's right to the assets held in or to receive payments under. . ." a pension plan. Tex. Prop. Code Title 5, § 42-0021(a). This language clearly does not cover benefits after they are received. Furthermore, subsection (c) of the same Texas statute confirms this view, since it specially exempts distributions from a plan if they qualify as a nontaxable rollover for a period of only 60 days after the date of distribution. Subsection (c) of the statute would be superfluous if the statute generally exempted pension benefits after receipt by the pensioner for an unlimited period.

In sum, this Court should not utilize its powers of review to determine the applicability of a Texas statute or to interpret such a statute for the first time. Those questions are better left to the lower courts for determination.

CONCLUSION

This case presents no sound basis for exercise of the Court's discretionary right of review. The "law of the case" doctrine is longstanding and straightforward and requires no further explication by this Court. Furthermore, this Court need not review the scope of ERISA's anti-alienation provision which is agreed upon unanimously by those lower courts which have ruled on the issue. Also, it would be an unwise exercise of this Court's power of review to construe the ERISA attorneys' fees statute when the sole ERISA issues concerning the union were raised as defenses. Finally, this Court should not exercise its discretion to consider the Texas exemption

statute when there has been no consideration of that statute in a lower court, and the plain meaning of the statute is contrary to Guidry's claim.

For the above stated reasons, the petition should be denied.

Respectfully submitted,

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Dated: March 1, 1995

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No. 94-1300

In The

Supreme Court of the United States

October Term, 1994

CURTIS GUIDRY,

Petitioner,

v.

SHEET METAL WORKERS' NATIONAL PENSION FUND; SHEET METAL WORKERS' LOCAL UNIONS AND COUNCILS PENSION PLAN; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 9; SHEET METAL WORKERS' LOCAL NO. 9 PENSION FUND, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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Since the filing of the Petition for Writ of Certiorari and Briefs in Opposition, Petitioner Curtis Guidry ("Guidry") became aware of the decision of the Court of Appeals for the Fourth Circuit, in the case of *United States of America v. Charles Herbert Smith*, No. 93-5426 ___ F.3d ___, 63 USLW 2556, 1995 WL 85445, decided March 3, 1995.

For the assistance of the Court, Guidry is attaching such decision as Appendix A to this Supplemental Brief.

United States of America v. Smith deals with the pivotal issue in this case, whether the Employer Retirement Income Security Act ("ERISA") protects pension benefits post-distribution in the hands of the retired pensioner. The Fourth Circuit first cites this Court's decision in *Guidry* 593 U.S., at 376, 110 S. Ct., at 687, that, "The Supreme Court has noted that the purpose of ERISA is to safeguard a stream of income for pensioners." In upholding the breadth of the ERISA anti-alienation clause, even after distribution, the court again refers to the *Guidry* decision, for the proposition that the argument of the government, "does not alter the Supreme Court's findings that ERISA funds are inviolate, with exceptions only as announced by Congress."

The dissent cites the Tenth Circuit *Guidry II* and *III* decisions, which is subject to the instant Petition for Writ of Certiorari.

Therefore, in addition to the other arguments previously made, pursuant to Rule 10.1(a), there is now a conflict within the United States Court of Appeals regarding the primary question presented by this Writ, namely,

whether ERISA protects segregated benefits which have been distributed to the pensioner, after retirement.

CONCLUSION

It is again respectfully requested that this Petition for Writ of Certiorari be granted.

April 1995

Respectfully submitted,

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Citation
___ F.3d ___
63 USLW 2556
(CITE AS: 1995 WL 85445 (4TH CIR. (MD.)))

UNITED STATES of America, Plaintiff-Appellee,

v.

Charles Herbert SMITH, Defendant-Appellant.
No. 93-5426.

United States Court of Appeals,

Fourth Circuit.

Argued March 7, 1994.

Decided March 3, 1995.

Defendant was convicted by the United States District Court for the District of Maryland, Herbert F. Murray, Senior District Judge, after pleading guilty to mail and wire fraud, and he appealed restitution order. The Court of Appeals, Ervin, Chief Judge, held that restitution order requiring defendant to pay his monthly pension violated Employee Retirement Income Security Act's (ERISA) anti-alienability provisions.

Vacated and remanded for redetermination.

Williams, Circuit Judge, filed dissenting opinion.

ARGUED: Denise Charlotte Barrett, Asst. Fed. Public Defender, Baltimore, MD, for appellant. Christopher Bowmar Mead, Asst. U.S. Atty., Baltimore, MD, for appellee. ON BRIEF: James K. Bredar, Federal Public Defender, Baltimore, MD, for appellant. Lynne A. Battaglia, U.S. Atty., Raymond A. Bonner, Asst. U.S. Atty., Baltimore, MD, for Appellee.

Before ERVIN, Chief Judge, WILLIAMS, Circuit Judge, and SPROUSE, Senior Circuit Judge.

Vacated and remanded by published opinion. Chief Judge ERVIN wrote the opinion, in which Senior Judge SPROUSE joined. Judge WILLIAMS wrote a dissenting opinion.

OPINION

ERVIN, Chief Judge:

On September 24, 1992, a federal grand jury indicted Dr. Charles Smith on six counts of mail and wire fraud stemming from his nine year campaign to solicit investments from numerous friends and acquaintances for fraudulent real estate schemes. Smith's fraud caused losses of over $200,000. On March 25, 1993, pursuant to a plea agreement, Smith pled guilty to count one of the indictment charging him with wire fraud in violation of 18 U.S.C. § 1343. The plea agreement called for a 21-month sentence and a recommendation that the sentencing court order restitution based on Smith's financial means. The district court ordered Smith to turn over upon receipt each month the entire amount of his pension benefits payable under an ERISA plan. Smith appeals the restitution order on the basis of ERISA's anti-alienability provisions. For the reasons set forth below, we vacate the restitution order and remand for its redetermination.

I.

The parties stipulated to the facts in the plea agreement. Smith is a former public school principal, Johnson

Administration official, and employee of the Rockefeller Foundation, with extensive personal contacts in government and education. At the time of these events, he was an independent educational consultant engaged in producing educational videos.

Beginning in 1983, Smith solicited at least fifty friends and acquaintances for investments in fraudulent business schemes, including investments in land deals in the "Caribbean Group." Smith implied that the investments were supported by his former employer, the Rockefeller Foundation. The fraud victims made checks payable to Smith or wired money directly to accounts controlled by Smith. In one instance, a check was made out to Smith's landlord who credited the amount to Smith's rent bill. Smith converted the majority of the money collected to his personal use. He lied and made excuses when pressed by the investors, concealing his fraud. The amount of the loss was at least $200,000 and probably greater than $350,000.

Upon arrest, Smith expressed remorse for his crime and a desire to pay restitution upon his release from prison. The revised Presentence Report ("PSR") indicated that Smith receives $1,188 per month in pension benefits from two separate ERISA plans, that he would become eligible on May 6, 1993 for social security benefits probably amounting to $602 per month, and that his wife receives a net monthly salary of $1900 from her employment as a third grade school teacher. The PSR recommended restitution that would require Smith to relinquish upon receipt his entire $1188 monthly pension benefits over a period of five years after his release from prison, with slightly lower payments while he is in jail.

The district court accepted the recommendation and ordered Smith to turn over his pension benefits each month as he received them upon his release from prison.

II.

The Employee Retirement Income Security Act (ERISA) provides that "each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). Binding Treasury Department Regulations further prohibit involuntary transfers of benefits from qualified plans by requiring that "benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process." 26 C.F.R. § 1.401(a-13b)(1).

This court has long recognized a "strong public policy against the alienability of an ERISA plan participant's benefits." Smith v. Mirman, 749 F.2d 181, 183 (4th Cir. 1984). The Supreme Court, as well, has found that it is not "appropriate to approve any generalized equitable exception – either for employee malfeasance or for criminal misconduct – to ERISA's prohibition on the assignment or alienation of pension benefits." Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 376, 110 S.Ct. 680, 687, 107 L.Ed.2d 782 (1990) ("Guidry"). In Guidry, the Court was faced with the competing policies of ERISA and the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), which was designed to prevent the corruption of union officials. The Court refused to allow

ERISA pension benefits to be used to effectuate the remedial goals of LMRDA because such use would imply that "ERISA's anti-alienation provision would be inapplicable whenever a judgment creditor relied on the remedial provisions of a federal statute. Such an approach would eviscerate the protections of [ERISA]." Id. at 375, 110 S.Ct. at 687.

The government urges that Guidry is inapplicable because that case prohibited alienation of funds that had not yet been disbursed to the beneficiary. The government's position is that once pension funds have been distributed, the anti-alienability statute no longer applies. It finds support for that argument in this court's decision in Tenneco Inc. v. First Virginia Bank, 698 F.2d 688 (4th Cir.1983).* In that case, when a subsidiary of Tenneco terminated the employment of Donald Sweeney before he reached retirement age, all accrued benefits under his ERISA pension plans became payable to him within a reasonable time after his request. Sweeney drew down over $37,000, with over $5,000 remaining in the hands of

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* The Tenth Circuit, upon remand of Guidry, likewise found that pension funds, once distributed, are no longer protected. Guidry v. Sheet Metal Wkrs. Intern. Ass'n, Local 9, 10 F.3D 700 (10th Cir.1993) ("Guidry II"). The court found that although the Supreme Court had invalidated a constructive trust placed on pension funds due but not yet paid to Guidry, the Court's mandate did not prohibit garnishment of the funds once distributed to Guidry. The Third Circuit has followed this reasoning. Trucking Employees of North Jersey Welfare Fund Inc. v. Colville, 16 F.3d 52 (3d Cir.1994). We decline to adopt this approach. We believe that the reasoning in Guidry II circumvents the logic of Guidry and Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979), as discussed infra.

the trustee of the plans. First Virginia Bank obtained a judgment against Sweeney after he had withdrawn the funds, and it sought to compel payment from both the funds distributed and those remaining in the plans. This court held that where the beneficiary had taken a pre-retirement draw of a lump sum due upon termination of his employment, although the funds had originated in an ERISA account, they were not forever immune from attachment by creditors. Id. at 691. The bank was permitted to garnish the funds that had been distributed to Sweeney. We also found, however, that the funds remaining in the hands of the trustee were beyond the reach of a writ of garnishment. Id at 690.

We believe there is a distinction between funds disbursed from an ERISA plan before an employee has retired and such funds paid as an annuity for retirement purposes. The Supreme Court has noted that the purpose of ERISA is to safeguard a stream of income for pensioners. Guidry, 493 U.S. at 376, 110 S.Ct. at 687. Where an employee elects to draw on her ERISA plan prior to her retirement, she forfeits the protection provided by the Act. Where, however, the funds are paid pursuant to the terms of the plan as income during retirement years, ERISA prohibits their alienation. In fact, we found in Tenneco that "the funds here had been accumulated under a general plan for retirement, and the statutory scheme clearly contemplates that they should remain available for that purpose. . . . " 698 F.2d at 690.

This distinction is supported by the Supreme Court's decision in Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979). There, the Court found that

pension annuities cannot be alienated even once disbursed to the beneficiary. In that divorce case, a spouse attempted to gain an interest in her husband's pension benefits due under the Railroad Retirement Act (RRA). The RRA contains anti-alienation provisions substantially similar to those in ERISA, prohibiting annuity funds from being subject to assignment, anticipation, garnishment, attachment or other legal process, with statutory exceptions for child support and alimony. Id. at 576, 99 S.Ct. at 805. In ruling that the district court could not retain jurisdiction over the husband and order him to pay an appropriate portion of his benefits as he received them, the Court found that such a "course . . . runs contrary to the language and purpose of [the statute] and would mechanically deprive petitioner of a portion of the benefit Congress . . . indicated was designed for him alone." Id. at 583, 99 S.Ct. at 809.

In the case at hand, the government attempted to require Smith to draw down his benefits due under the plans as a lump sum and turn it over intact as restitution. J.A. 30. Upon discovering that Smith was not eligible for lump sum distribution, the government agreed to the recovery of his benefits as they are paid to him. It is clear that the government would not have been successful in requiring Smith to request a lump sum distribution. As this court held in Tenneco, benefits in the hands of the fiduciary are beyond the reach of garnishment. 698 F.2d at 690. The government should not be allowed to do indirectly what it cannot do directly; it cannot require Smith to turn over his pension benefits in a lump sum, nor can it require him to turn over his benefits as they are paid to him. "Understandably, there may be a natural

distaste for the result we reach here. The statute, however, is clear." Guidry, 493 U.S. at 377, 110 S.Ct. at 688. Congress has made a policy decision to protect the ERISA income of retirees, "even if that decision prevents others from securing relief for the wrongs done them." Id. at 376, 110 S.Ct. at 687.

The Court further noted "as general matter, courts should be loath to announce equitable exceptions to legislative requirements or prohibitions that are unqualified by the statutory text." Id. This court, too, has noted the danger in eroding through exception the anti-alienation policy of ERISA. That entire legislation was aimed at guaranteeing the security of retirement income for American workers. . . . We decline to participate in the diminution of these safeguards in circumstances which might seem harmless enough in particular instances but which, in the aggregate, might invite creditors to believe that ERISA funds are not, after all, inviolate.

Smith, 749 F.2d at 184.

The Government claims that the policy governing restitution under the Victim and Witness Protection Act obligates the defendant to make restitution payments regardless of the source of his income. This policy does not alter the Supreme Court's findings that ERISA funds are inviolate with exceptions only as announced by Congress. Guidry, 493 U.S. at 377, 110 S.Ct. at 687. It is not for the courts to determine when exceptions to ERISA are appropriate.

III.

The restitution order in this case clearly required Smith to relinquish his pension benefits. The district court stated, "Well, he will be paying amounts, or pension [sic], and, once those sums are in his hands, it seems to me that they are subject to the existing order of this court announced today." J.A. 60. That approach is impermissible. Smith cannot be forced to relinquish his ERISA pension benefits for restitution.

On remand the court must determine an appropriate amount of restitution that Smith must pay based on his financial resources. Although the court cannot mechanically deprive Smith of his pension benefits, it can determine restitution based on a balance of the victims' interest in compensation and Smith's other financial resources. United States v. Bruchey, 810 F.2d 456, 458 (4th Cir. 1987). Although the district court may determine an appropriate amount of restitution based on its findings as required by Bruchey, it must make that determination while leaving Smith's ERISA-protected benefits in his possession. Congress requires that ERISA beneficiaries retain their pension benefits for retirement purposes.

IV.

The district court's restitution order is vacated and remanded for redetermination.

VACATED AND REMANDED.

WILLIAMS, Circuit Judge, dissenting:

I am unable to accept the majority's conclusion that the anti-alienation provision of ERISA precludes the district court from entering a restitution order that takes into consideration Smith's retirement income as a source from which, when received, he can make payments to compensate the numerous victims of his criminal acts.[1] In my opinion, the majority errs in relying on two Supreme Court decisions which do not answer the question before us and in creating a circuit split with two Courts of Appeal that have confronted the question. Accordingly, having discerned no error on the part of the district court in the formulation of its restitution order, I respectfully dissent from the majority opinion and would affirm the decision of the district court.

The majority primarily bases its decision on Guidry v. Sheet Metal Workers Nat'l Pension Fund, 493 U.S. 365, 376, 110 S.Ct. 680, 687, 107 L.Ed.2d 782 (1990). In Guidry, the Supreme Court addressed whether the imposition of a constructive trust by the district court violated the statutory prohibition on assignment or alienation of pension benefits under § 206(d)(1)of ERISA, 29 U.S.C. § 1056(d)(1). Id. Specifically, in that case, Guidry had not received any pension benefits at the time the district court imposed the constructive trust. The Court held that § 206(d)(1) applied to garnishment proceedings and that the imposition of a constructive trust remedy in such a

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[1] Of course, should Mr. Smith's financial condition change, he would be able to apply to the court for a modification of the restitution payments. 18 U.S.C.A. § 3663(g) (West 1985 & Supp.1994).

setting violated ERISA. Id. at 376-77, 110 S.Ct. at 687-88. Important for this case, the Supreme Court reasoned that it would be inappropriate "to approve any generalized equitable exception – either for employee malfeasance or for criminal misconduct – to ERISA's prohibition on the assignment or alienation of pension benefits." Id. at 376, 110 S.Ct. at 687. This proposition forms the basis, in large part, upon which the majority decides this case. Op. at ___.

While I certainly agree with the majority that under Guidry the federal courts are not to fashion equitable exceptions to the assignment and alienation provision of ERISA, I conclude that Guidry does not resolve the specific issue before us which can be decided under the statute: whether § 206(d)(1) of ERISA and the Department of Treasury's interpretation of "assignment" or "alienation" in the Treasury Regulations, Treas. Reg. 1.401(a)-13(c), prohibits a restitution order that may affect pension benefits that Smith will have received at the time a payment is to be made. The best demonstration of this difference comes from the Tenth Circuit Court of Appeals on remand of Guidry. Unable to impose a constructive trust over Guidry's pension plan, the district court on remand was confronted with whether it could issue an order that imposed garnishment of benefits after they were paid to Guidry. Guidry v. Sheet Metal Workers Int'l Ass'n, 10 F.3d 700, 704-05 (1993) (Guidry II), modified on reh'g and remanded on other grounds, 39 F.3d 1078 (10th Cir.1994) (en banc). The district court held that it could. On appeal, one of Guidry's main contentions was that the kind of order the district court could issue had been resolved by

the Supreme Court. Id. at 705. The Tenth Circuit disagreed, reasoning:

> The Supreme Court, in considering a constructive trust, (1) held that ERISA § 206(d)(1) applied to garnishment proceedings, Guidry, 493 U.S. at 371-72, 110 S.Ct. at 684-85; and (2) reversed the imposition of a constructive trust over the pension benefits of Mr. Guidry in the plan, id. at 376-77, 110 S.Ct. at 687. This case, in contrast, involves a writ of garnishment issued by a Colorado court upon the garnishee, First Interstate Bank, subjecting the pension funds of Mr. Guidry in the account to the process of garnishment. This case, therefore, is factually distinct from Guidry in the critical respect that the garnishment process is over funds that Mr. Guidry has received, whereas the constructive trust invalidated by Guidry was over benefits in the plan.

Guidry II, 10 F.3d at 706 (emphasis added). The panel's reasoning was unanimously upheld when the question was considered by the Tenth Circuit en banc. Guidry v. Sheet Metal Workers Nat'l Pension Fund, 39 F.3d 1078, 1081 (10th Cir.1994) (en banc) (Guidry III).[2] For the same reasons offered by the Tenth Circuit on remand, I believe that the Guidry decision does not resolve the

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[2] It is worth noting that, procedurally, the en banc court in Guidry III did not vacate the panel opinion in Guidry II. In fact, the en banc court relied in large part upon the analysis offered by the panel in its discussion of what issues were and were not resolved when the Supreme Court had previously heard the case. Guidry III, 39 F.3d at 1081 n. 2 ("We find no reason to further clarify or disturb the panel's analysis of the law of [the] case. See Guidry II, 10 F.3d at 705-08, for the full discussion.").

issue presented here and that we must take a fresh look at the relevant statutory and regulatory provisions.

Since the issuance of Guidry two of our sister circuits have addressed the issue we face and held that pension funds, once distributed, are no longer protected under § 206(d)(1). Guidry II, 10 F.3d at 705-08, Guidry III, 39 F.3d at 1081-83; Trucking Employees of North Jersey Welfare Fund v. Colville, 16 F.3d 52, 55 (3rd Cir.1994). I agree with the reasoning offered in these decisions and, for the purposes of this dissent, will simply summarize the major points in their decisions. To begin, the relevant statutory text in § 206(d)(1), "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated," 29 U.S.C. § 1056(d)(1), is ambiguous when one attempts to discern the meaning of "benefits provided under the plan." Guidry II, 10 F.3d at 708. Given the ambiguity in the text of the statute, the Guidry II and Trucking Employees courts turned to the Department of Treasury regulation which define "assignment" and "alienation" as:

> Any direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary.

Treas. Reg. § 1.401(a)-13(c)(1)(ii) (emphasis added). As did the courts in Guidry II and Trucking Employees, I would hold that while there is admittedly some tension between the general principle under ERISA of protecting the beneficiary's retirement benefits and the Department

of the Treasury's interpretation of the anti-alienation provision, the agency's interpretation is clear, reasonable, and entitled to deference under Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984); Trucking Employees, 16 F.3d at 55-56 (applying interpretation to restitution order); Guidry II, 10 F.3d at 710 (applying interpretation to garnishment proceeding). Under the above-stated regulatory provision, the restitution order against Smith's "received retirement income is not an action against the plan[;] it is not prohibited by ERISA § 206(d)(1) as implemented by the ERISA Regulations." Guidry II, 10 F.3d at 710. Following our two sister circuits, I would hold that pension funds, once distributed, are not longer protected under § 206(d)(1).

This conclusion is further bolstered by our decision in Tenneco Inc. v. First Virginia Bank, 698 F.2d 688, 690-91 (4th Cir.1983). In Tenneco, we confronted a question substantially similar to the one at issue here. The question there was whether an employee's interest in an ERISA plan was "subject to garnishment by a judgment creditor of the employee." Id. at 689. The discussion in that case turned in large part on the fact that when the employee was terminated, all accrued benefits "became payable to him within a reasonable time after his request." Id. Interpreting the substantially similar language contained in Treas. Reg. § 1.401(a)-13(b)(1), we held that the balances remaining in the employee's pension accounts were not garnishable, but that those funds that had been withdrawn by the employee (and not rolled-over into another qualified plan within the allowed sixty-day period) were garnishable. Id. at 690-691. In so holding, we rejected the

employee's argument that any funds, whether paid out to him or not, that had accumulated in the pension accounts were "forever immune" from attachment by a creditor. Specifically, we held that we could find "[n]o provision of ERISA" that would support protection for the funds once they were no longer in a qualified ERISA approved plan. Id. at 691. In short, as I read Tenneco, we drew a distinction between the protection afforded benefits still in the hands of the trustee and the protection afforded distributed funds in the hands of the beneficiary – exactly the proposition espoused by the courts in Guidry II and Trucking Employees.

The majority attempts to avoid this interpretation by narrowly construing the holding in Tenneco to draw "a distinction between funds disbursed from an ERISA plan before an employee has retired [Tenneco] and such funds paid as an annuity for retirement purposes [this case]." Slip Op. at 5. Finding nothing in the ERISA statutory text or regulations to support a distinction between disbursed funds before and after retirement, the majority relies on the Supreme Court's decision in Guidry for support of the proposition that "the purpose of ERISA is to safeguard a stream of income for pensioners." Id. Once again, while I agree with this general principle, I cannot agree with its application where ERISA's statutory language and regulations make clear that the benefits, once distributed, may be attached. Left without support from Guidry, the majority puts forth the following without any direct support from ERISA or case law: "Where an employee elects to draw on her ERISA plan prior to her retirement, she forfeits the protection provided by the Act. Where, however, the funds are paid pursuant to the terms of the

plan as income during retirement years, ERISA prohibits their alienation." Op. at ___. I cannot agree with such a distinction.

Finally, I do not find support for the majority's pre-retirement/postretirement distinction in Hisquierdo v. Hisquierdo, 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979). In Hisquierdo, the Supreme Court determined that a spouse's expectation of receiving railroad retirement benefits (not an ERISA-covered plan) was not subject to allocation and division between spouses by a state domestic court. Id. at 590-91, 99 S.Ct. at 812-13. In reaching this conclusion, however, the Court, noting the prohibition on alienation of benefits to a divorced spouse under 45 U.S.C. § 231(c)(3), id. at 585-86, 99 S.Ct. at 810-11, merely implemented the express intent of Congress specified in the Railroad Retirement Act (the RRA). 45 U.S.C. § 231m(a). The text of § 231m(a) states, in relevant part:

> Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated. . . .

Id. (emphasis added). The majority reads this provision as being "substantially similar" to the anti-alienation provision at stake in this case. Op. at ___. I cannot agree, as there is nothing in either ERISA's text or regulatory provisions suggesting an equivalent breadth of protection to benefits as preventing alienation "under any circumstances whatsoever." Accordingly, while Hisquierdo may

– like the Supreme Court decision in Guidry – support the general proposition that courts should not generally favor allowing the beneficiary to lose his benefits, the case simply does not answer the more precise inquiry of statutory interpretation that I believe must be addressed in order to resolve this case. The decision of the majority fails to account for the clear language of the Treasury regulation to which we owe deference as a reasonable agency interpretation. Furthermore, it is at odds not only with the law of this circuit but also with that articulated by the Third and Tenth Circuits. Since neither of the Supreme Court opinions cited by the majority appears to control the question, I wonder that the majority has chosen to ignore a reasonable agency interpretation of § 206(d)(1) and create a split among the circuits to reach such a seemingly inequitable result which denies restitution to victims of illegal conduct. I, therefore, respectfully dissent.